134-126

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1287.

THOMAS J. BRYAN, APPELLANT,

vs.

M. W. KALES, L. H. ORME, ROBERT GARSIDE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 4, 1889.

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a In the District Court of the Second Judicial District of the Territory of Arizona in and for Maricopa County.

THOMAS J. BRYAN, Plaintiff,
vs.
M. W. KALES, L. H. ORME (Sheriff), ROBERT GARSIDE, WILLIAM Gilson, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa, a Corporation; F. Q. Story, and M. H. Sherman, Defendants.

To the district court of the second judicial district of the Territory of Arizona in and for Maricopa county:

1 The plaintiff, Thomas J. Bryan, complains of the defendants, M. W. Kales, L. H. Orme, sheriff; Robert Garside, William Gilson, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa, a corporation; F. Q. Story, M. H. Sherman, and alleges—

I.

That the plaintiff, T. J. Bryan, and defendants, L. H. Orme, Robert Garside, William Gilson, Lizzie E. Gilson, J. T. Simms, Hannah T. Simms, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, and M. H. Sherman, reside in Maricopa county, Arizona, and defendant, M. W. Kales, resides in Oakland, Alameda county, California;

Defendant, J. De Barth Shorb, resides in the city of San Gabriel, Los Angeles county, California;

Defendant, George T. Brasius, resides in Gallipolis, Gallia county, Ohio;

Defendant, D. H. Pinney, resides in Napa City, Napa county, California;

Defendant, The Bank of Napa, resides at Napa City, Napa county, California, and

Defendant, F. Q. Story, resides at Oakland, Alameda county, California.

2 II.

That one Jonathan M. Bryan, on or about the 29th day of August, 1883, died intestate and — the time of his death, was the owner, seized, and possessed of the following real property, situated in Maricopa county, Territory of Arizona, described as follows, to wit:

The southeast quarter section number thirty-three (33), in township two (2) north, of range three (3) east, of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, and of the Gila and Salt river meridian.

Also the northeast quarter of section five (5), in township one (1) north, of range three (3) east, of the Gila and Salt river meridian, and of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, the said piece of land lying one-half mile north of the city of Phœnix, in said county of Maricopa, formerly known as the "Shortle ranch" and now commonly known and designated as "Central Place."

Also the southeast quarter of section nine (9), in township one (1) north, of range three (3) east, of Gila and Salt river meridian, and of the district of lands subject to sale at the land office at Tucson, Arizona.

Also all of block number ninety-eight (98), in the city of
3 Phœnix, according to the map or plat of said city, made by William A. Hancock, surveyor of the town site of said city, and which said map or plat is on file in the office of the county recorder of said Maricopa county, in the Territory of Arizona, said premises being commonly called, known, and designated as block number 98 of the said city of Phœnix.

III.

That on or about the 24th day of September, 1883, letters of administration upon the estate of said Jonathan M. Bryan, deceased, were issued by the probate court of said Maricopa county, in this Territory, to one M. W. Kales, and immediately thereupon the said M. W. Kales qualified as such administrator and entered upon the discharge of the duties of his said office and continued thenceforth to be and to act as such administrator until his discharge therefrom by said probate court, on the sixth day of December, 1884, since which time there has been no administrator of said estate nor any one entitled to administrate thereon nor any necessity therefor.

IV.

That during lifetime of said Bryan and while he was such owner and so seized and possessed of said property he made, executed, and delivered to the said M. W. Kales his four separate promissory notes
4 at the several times and for the several amounts in said notes expressed; which said notes are in words and figures as follows, to wit:

N-. —. PHŒNIX, ARIZONA, 12, 11, '82.

On the eleventh day of December, A. D. one thousand eight hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, twelve hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months; if not so paid, then this note to become due and payable immediately.

$1,200. (Signed) J. M. BRYAN.

No. 1279. PHŒNIX, ARIZONA, *Feb'y* 23, '83.

On the 23d day of February, A. D. one thousand eight hundred and eighty-four (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, twenty-five hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months, and if not so paid this note shall be due and payable immediately.

$2,500. (Signed) J. M. BRYAN.

No. 1283. PHŒNIX, ARIZONA, *Feb'y 26th*, 1883.

On the twenty-sixth day of October, A. D. one thousand eight hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-
5 house of Kales and Lewis, fifteen hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months, and if not so paid, then this note shall become due and payable immediately.

$1,500. (Signed) J. M. BRYAN.

No. 1306. PHŒNIX, ARIZONA, *March* 14, 1883.

On the fourteenth day of September, A. D. one thousand eight hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, five hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months.

$500. (Signed) J. M. BRYAN.

V.

That said Jonathan M. Bryan, to secure the payment of these said certain several notes, did make, execute, and deliver to the said Kales his certain mortgage upon the lands above described or portion thereof, as in said mortgages respectively set forth; which said mortgages are each in words and figures and bear the dates therein mentioned as follows:

This indenture, made the eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-two,
6 between Jonathan M. Bryan, of the county of Maricopa, Territory of Arizona, party of the first part, and M. W. Kales, of the same county and Territory, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of twelve hundred dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, and convey unto the party of the second part and to his heirs and assigns forever all that certain piece or parcel of land situated in the said county of Maricopa, Territory of Arizona, bounded and described as follows:

The southeast quarter of section number thirty-three (33), in township two (2) north, of range three (3) east, of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, and of the Gila and Salt river meridian—

Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, of even date herewith; which said note is in the words and figures following, to wit:

N-. —. PHŒNIX, ARIZONA, *Dec.* 11, 1882.

On the eleventh day of December, A. D. one thousand eight
7 hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, twelve hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months; if not so paid, then this note is to become due and payable immediately.

$1,200. (Signed) J. M. BRYAN.

And these presents shall be void if such payments be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said promissory note provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and ten per cent. for attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) J. M. BRYAN. [SEAL.]

8 TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

On the eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-two, before me, John T. Alsap, a notary public in and for said Maricopa county, in the Territory of Arizona, personally appeared J. M. Bryan, personally known to me to be the person described in and who executed the foregoing instrument as a party thereto, and he acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[SEAL.] (Signed) JOHN T. ALSAP,
Notary Public.

Indorsed as follows: Recorded, at the request of J. M. Bryan, Dec. 11th, A. D. 1882, at 30 minutes past 11 a. m., in Book 2 of Mortgages, pages 483, etc. (Signed) R. F. Kirkland, county recorder.

This indenture, made the twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-three, between Jonathan M. Bryan, of the county of Maricopa, in the Territory of Arizona, party of the first part, and M. W. Kales, of the same county and Territory, the party of the second part witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty-five hundred dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns forever all that certain piece or parcel of land situated in the said county of Maricopa, Territory of Arizona, bounded and described as follows:

The northeast quarter of section five (5), in township one (1) north, of range three (3) east, of the Gila and Salt river meridian, and of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, the said piece of land lying one-half mile north of the city of Phœnix, in said county of Maricopa, and known as the "Shortle ranch," together with all — singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, of even date herewith; which said note is in the words and figures following, to wit:

No. 1279. PHŒNIX, ARIZONA, *Feb.* 23, 1883.

On the twenty-third day of Feb., A. D. one thousand eight hundred and eighty-four (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, twenty-five hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months, and if not so paid this note shall be due and payable immediately.

$2,500. (Signed) J. M. BRYAN.

And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said promissory note provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from sale to retain the said principal and interest, together with the costs and charges of making such sale and ten per cent. for attorney's fees, and the overplus, if any there be, shall be paid,

by the party making such sale on demand to the said party of the first part, his heirs and assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) J. M. BRYAN. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

11 On the twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-three, before me, John T. Alsap, a notary public in and for Maricopa county, in the Territory of Arizona, personally appeared J. M. Bryan, personally known to me to be the person described in and who executed the foregoing instrument as a party thereto and who signed the same, and he, the said J. M. Bryan, acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] (Signed) JOHN T. ALSAP,
Notary Public.

Indorsed as follows: Recorded, at the request of M. W. Kales, February 23d, A. D. 1883, at 40 min. past 1 o'clock p. m., in Book 2 of Mortgages, pages 509, 510.

(Signed) NERI OSBORN,
Co. Recorder,
By W. R. MORRIS, *Deputy.*

This indenture, made the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and eighty-three, between Jonathan M. Bryan, of Phœnix, Maricopa county, Arizona Territory, the party of the first part, and M. W. Kales, of the same place, the party of the second part, witnesseth:

12 That the said party of the first part, for and in consideration of the sum of fifteen hundred dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, and convey unto said party of the second part and to his heirs and assigns forever all that certain piece or parcel of land situated in the county of Maricopa, Territory of Arizona, bounded and described as follows:

The southeast quarter of section nine (9), in township one north, range three east, of Gila and Salt river meridian, and of the district of lands subject to sale at the land office at Tucson, Arizona, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, bearing even date herewith, in the words and figures *as* following:

No. 1283. PHŒNIX, ARIZONA, *Feb. 26th*, 1883.

On the 26th day of October, A. D. one thousand eight hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, fifteen hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per
13 month, from date until paid, interest payable every three months, and if not so paid, then this note shall become due and payable immediately.

$1,500. (Signed) J. M. BRYAN.

And these presents shall be void if such payment be made according to the tenor and effect thereof, but in case default be made in the payment of the principal or interest, as in said note provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and five per cent. for attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) J. M. BRYAN. [SEAL.]

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

On this ninth day of March, A. D. one thousand eight hun-
14 dred and eighty-three, before me, Wm. H. Hancock, a notary public in and for said county of Maricopa, personally appeared J. M. Bryan, known to me to be the same — whose name is subscribed to the said annexed instrument, who then duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[SEAL.] (Signed) WM. A. HANCOCK,
Notary Public.

Indorsed as follows: Recorded, at the request of M. W. Kales, March 9th, A. D. 1883, at 15 min. past 9 o'clock a. m., in Book 2 of Mortgages, pages 519, 520, 521. (Signed) Neri Osborn, county recorder, by W. R. Morris, deputy.

This indenture, made the fourteenth day of March, in the year of our Lord one thousand eight hundred and eighty-three, between J. M. Bryan, of the county of Maricopa, in the Territory of Arizona, party of the first part, and M. W. Kales, of the same county and

Territory, the party of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns forever all that certain piece or parcel of land situate in the county of Maricopa, Territory of Arizona, bounded and described as follows:

All of block number ninety-eight (98), in the city of Phœnix, according to the map or plat of said city made by William A. Hancock, surveyor of the town site of said city, and which said map or plat is on file in the office of the county recorder of said Maricopa county, in the Territory of Arizona, and reference is here made to said map or plat for size and location of said block, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, of even date herewith; which said promissory note is in the words and figures following, to wit:

No. 1306. PHŒNIX, ARIZONA, *March 14th*, 1883.

On the fourteenth day of September, A. D. one thousand eight hundred and eighty-three (without grace), for value received, I promise to pay to the order of M. W. Kales, at the banking-house of Kales and Lewis, five hundred dollars in U. S. gold coin, with interest thereon, at the rate of one and one-half (1½) per cent. per month, from date until paid, interest payable every three months.

$500. (Signed) J. M. BRYAN.

And these presents shall be void if such payment be made according to the tenor and effect thereof, but in case default be made in the payment of the principal or interest, as in said promissory note provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money rising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and ten per cent. for attorneys' fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs and assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) J. M. BRYAN. [SEAL.]

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

On this fourteenth day of March, in the year of our Lord one

thousand eight hundred and eighty-three, before me, John T.
17 Alsap, a notary public in and for the county of Maricopa, in the Territory of Arizona, personally appeared J. M. Bryan, personally known to me to be the person described in and who executed the foregoing instrument as a party thereto, and he acknowledged to me that he executed the said instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] (Signed) JOHN T. ALSAP,
Notary Public.

Indorsed as follows: Recorded, at the request of M. W. Kales, March 14th, A. D. 1883, at 20 min. past 11 o'clock a. m., in Book 2 of Mortgages, pages 521, 522. (Signed) Neri Osborn, county recorder, by W. R. Morris, deputy.

VI.

That the said M. W. Kales, before any of the said notes became due or payable, and before they or any of them had been presented for allowance as claims against the estate of said J. M. Bryan, to any executor or administrator of said estate or to the probate judge or to the probate court having jurisdiction thereof, and before the same or any of them had been allowed or rejected or in any way acted upon by any executor or administrator or probate judge or
18 probate court or by any person or by any court having charge of said estate, and before applying to the probate court or any court having control of said estate for any order to pay said notes or any of them or the principal or interest on any of them, or to sell any personal property or any and which had been mortgaged to secure the payment of any of said notes or any property belonging to said estate, and while holding in his hands, as administrator, sufficient money to pay all the principal and interest which might become due on said notes or any of them he entered an action in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa in his own proper person and name and in his individual capacity against himself in his representative capacity as the said administrator of the said estate of J. M. Bryan, deceased, to which action there were no other parties plaintiff or defendant, which said action is register number 326 and entitled M. W. Kales, plaintiff, *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, defendant, and filed in said court on the 28th day of September, 1883, in which he declared upon said notes and mortgages and prayed for judgment in language as follows, to wit:

"Wherefore the plaintiff prays judgment against the said
19 defendant, administrator of the estate of J. M. Bryan, deceased.

First. For the sum of fifty-seven hundred dollars, with interest on twelve hundred dollars of sum from the 11th day of June, 1883, at the rate of one and one-half per cent. per month, and

with interest on twenty-five hundred dollars of said sum from the 23d day of May, 1883, at the rate of one and one-half per cent. per month, and with interest on fifteen hundred dollars of said sum from the 26th day of May, 1883, at the rate of one and one-half per cent. per month, and with interest on five hundred dollars of said sum at the rate of one and one-half per cent. per month from June 14th, 1883, and a like rate of interest upon the principal sum named in any judgment or decree that may be obtained herein from the date thereof until the same shall be fully paid and satisfied; for ten per cent. for attorneys' fees upon forty-two hundred dollars of such principal sum, and five per cent. for attorney's fees upon twenty-five hundred dollars of said principal sum and for costs of suit.

Second. That the usual decree may be made for the sale of said premises by the sheriff of said county according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount and to the plaintiff, and that said defendant and all persons claiming under him or his decedent subsequent to the execution of said mortgages upon said premises,
20 either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiff may have judgment against the said defendant, as administrator of the estate of J. M. Bryan, deceased, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment, and that such deficiency be made a claim against the estate of the said J. M. Bryan, deceased, to be paid as other claims against said estate.

Third. That the plaintiff or any other party to the suit may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's deed therefor, and that the plaintiff may have such other or further relief in the premises as to this court may seem meet and equitable.

VII.

That in such said action summons was issued out of said district court on the 5th day of October, 1883, requiring the said M. W. Kales, administrator of the estate of J. M. Bryan, deceased, to appear and answer the complaint filed against him by the said M. W. Kales and delivered to the sheriff of Maricopa county for service, which summons was on the same day returned by said sheriff, with
21 his certificate thereto attached, showing that he had personally served the same on said day on said M. W. Kales, administrator of the estate of J. M. Bryan, deceased, by delivering to him personally, in said county, a copy of said summons and complaint.

VIII.

That on the next day, to wit, October 6th, 1883, the said M. W.

Kales, administrator of the estate of J. M. Bryan, deceased, defendant, and as such administrator, did file his answer to the verified complaint of M. W. Kales, plaintiff, in which he says:

"The defendant, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, answering the complaint on file in this action, admits each and every material allegation in the said complaint and consents that judgment and decree be entered in accordance with the prayer thereof."

IX.

That thereupon, on the 16th day of October, 1883, the said district court rendered a judgment and decree as follows, to wit:

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

M. W. KALES, Plaintiff,
vs.
22 M. W. KALES, Administrator of the Estate of J. M. Bryan, Deceased, Defendant.

This cause having been brought on to be heard this 9th day of October, 1883, the same being a day of the regular October term of this court for the year 1883, upon the complaint filed therein and upon the answer filed thereto by the defendant, and the court having heard the proofs necessary to enable it to render judgment and decree herein, and it appears to the court from said proofs that there is now due to the plaintiff from the defendant, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, for principal and interest upon the debt and mortgages set forth in the complaint, the following sums, respectively: Upon the first debt and mortgage the sum of twelve hundred and seventy-one ($1,271.00) dollars; upon the second debt and mortgage the sum of twenty-six hundred and seventy ($2,670) dollars; upon the third debt and mortgage the sum of fifteen hundred and ninety-nine seventy-five hundredths ($1,599.75) dollars, and upon the fourth debt and mortgage the sum of five hundred and twenty-nine thirty-seven hundredths ($529.37) dollars, making in the aggregate of principal and interest due upon the whole of said debts and mortgages the sum of six thousand and seventy and twelve hundredths ($6,070.12) dollars, which sum is to draw and bear interest, at the rate of one
23 and one-half per cent. per month, from the date hereof; and it further appearing from the pleadings herein and the proofs submitted to the court that all the allegations in the said complaint are true: Now, on motion of Wm. A. Hancock, Esq., of counsel for the plaintiff, it is ordered, adjudged, and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much of each of the respective parcels thereof mentioned in the respective mortgages as may be sufficient to raise the amount due to the plaintiff for the principal and in-

terest of each of the respective mortgages and costs in the suit and expenses of the sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff of the county of Maricopa, where said mortgaged premises are situated; that the sale be made in the said county; that the sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to the sale of real estate under execution, and that the plaintiff or any parties to the suit may become the purchaser at such sale, and that the sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the morgaged premises on said sale; that the said sheriff out of the proceeds of said
24 sales of the respective parcels of property described in the separate mortgages retain his fees, disbursements, and commissions on the sale of the respective parcels, and pay to the plaintiff or his attorneys, out of the proceeds of the respective parcels, his costs in the suit, taxed upon the first said mortgage at $8.14 *dollars*, and upon the said second mortgage at $17.11 *dollars*, and upon the said third mortgage at $10.25 *dollars*, and upon the said fourth mortgage at $3.40 *dollars*, and amounting in the aggregate to the sum of $38.90; and the sum of one hundred and twenty dollars, fixed by said first mortgage and allowed by the court as counsel fees for foreclosure, and the sum of one hundred and twenty-five dollars, fixed by said second mortgage and allowed by the court as counsel fees for foreclosure, and the sum of one hundred and fifty dollars, fixed by said third mortgage and allowed by the court as counsel fees for foreclosure, and the sum of fifty dollars, fixed by said fourth mortgage and allowed by the court as counsel fees for foreclosure, amounting in the aggregate to the sum of four hundred and forty-five dollars, which said respective sums shall draw and bear interest from the date hereof at the rate of ten per cent. per annum.

And also the aggregate amount so found due as aforesaid upon the respective mortgages, with interest thereon at the rate of
25 one and one-half per cent. per month, or so much of the respective sums as the said proceeds of sale of the separate parcels of property mentioned in the respective mortgages will pay of the same, applying to the payment of each of the respective mortgages only the proceeds of the sale of the property mentioned and described in said mortgages.

That the defendant, M. W. Kales, as administrator as aforesaid, and all persons claiming or to claim from or under him or from or under the said J. M. Bryan, deceased, and all persons having liens subsequent to said mortgages by judgment, decree, or otherwise upon the lands described in said mortgages or either of them, and they or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their personal representatives, and all persons claiming under them be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises and every part and parcel thereof from and after the delivery of said sheriff's deed.

And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who, since the commencement of this action, has come into possession under them or either of them, deliver possession thereof
26 to the purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof.

And it is further adjudged and decreed that if the monies arising from said sale of any of the separate parcels of said lands described in either of the respective mortgages shall be insufficient to pay the amount so found due to the plaintiff, as above stated, upon each of the respective mortgages, with interests and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff upon each of the respective mortgages separately in his return of sale, and that on the coming in and filing of said returns of deficiency the same shall become a claim against the estate of J. M. Bryan, deceased, to be paid as other claims are paid.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgages referred to or from the complaint filed in this action are as follows, to wit:

In the first mortgage all that certain lot, piece, or parcel of land situate, lying, and being in the county of Maricopa and Territory of Arizona, described as follows:

The southeast ¼ of section number thirty-three (33), in township two (2) north, of range number three (3) east, of the Gila and
27 Salt river meridian, and of the district of lands subject to sale at the land office at Tucson, Arizona, together with all and singular the tenements, hereditaments thereto belonging or in anywise appertaining.

In the second mortgage all that certain lot, piece, or parcel of land situate, lying, and being in the county of Maricopa and Territory of Arizona, described as follows:

The northeast quarter of section number five (5), in township one (1) north, range three (3) east, of Gila and Salt river meridian, and of the district of lands subject to sale at the U. S. land office at Tucson, Arizona, the said piece of land lying one-half mile north of the city of Phœnix, in said county of Maricopa, and known as the "Shortle Ranch," together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

In the third mortgage all that certain lot, piece, or parcel of land situate, lying, and being in the county of Maricopa and Territory of Arizona, described as follows: The southeast quarter of section number nine (9), in township number one north, of range number three east, of the Gila and Salt river meridian, and of the district of lands subject to sale at the U. S. land office at Tucson, Arizona, together with all and singular the tenements and hereditaments and
28 *appertaining* appurtenances thereto belonging or in anywise appertaining.

In the fourth mortgage all that certain lot, piece, or parcel of land situate, lying, and being in the county of Maricopa and Territory of Arizona, described as follows: All of block ninety-eight (98), in the city of Phœnix, in said county of Maricopa, according to the plat of said city made by Wm. A. Hancock, surveyor, a copy of which said plat is on file in the office of the county recorder of Maricopa, in the Territory of Arizona, reference to which map is hereby made for the size and location of said block.

Done in open court this 16th day of October, 1883.

(Signed) D. H. PINNEY, *Judge.*

X.

That in pursuance of the said judgment and decree the said district court did, on the 8th day of November, 1883, make an order of sale commanding the sheriff of Maricopa county to notice for sale and sell all the property described in said mortgage and to make his return thereof to said district court.

XI.

That in pursuance of said order of sale defendant, L. H. Orme, sheriff of said county of Maricopa, did proceed to advertise
29 the said property for sale, and on the 15th day of December, 1883, did proceed to sell and did sell the said property and all thereof in parcels as follows:

To Robert Garside, the first above-described piece of real estate, being southeast quarter of section thirty-three (33), township two (2) north, range three (3) east, of the Gila and Salt river meridian, for the sum of fifteen hundred dollars.

To said M. W. Kales, the second above-described piece of property, being the northeast quarter of section five (5), township (1) north, range three (3) east, Gila and Salt river meridian, for the sum of twenty-nine hundred and seventy-five dollars.

To William Gilson, the third above-described piece of property, being the southeast quarter of section nine (9), township (1) north, range three (3) east, Gila and Salt river meridian, for the sum of eighteen hundred and fifty dollars.

To M. W. Kales, the fourth above-described piece of property, being all of block number ninety-eight (98), in said city of Phœnix, for the sum of six hundred dollars.

That each and all of the said prices bid and paid for each respective piece of property was an inferior price, much less than each was worth in the open market and much less than each would
30 have brought at a regular and usual sheriff's sale; and the said sheriff did make, execute, and deliver at the happening of and upon such sales the usual sheriff's certificate of sale to each of said respective purchasers for said respective pieces of property so sold.

XII.

That thereafter, on the 26th day of December, 1883, the said sheriff

did make to and file with said district court his return of said sales, but neither said sale nor any portion thereof has ever been confirmed by said district court.

XIII.

That after said sales by said sheriff and before the making of any deeds—said sheriff thereon, the said M. W. Kales as purchaser of the second above-described property, to wit, the northeast quarter of section five (5), township one (1) north, range three (3) east, Gila and Salt river meridian, assigned, transferred, and set over to defendant, J. T. Simms, the said sheriff's certificate of sale thereof and all his right thereunder; and after said sales by said sheriff and before the making of any deed by said sheriff thereonto the said M. W. Kales, as purchaser of the fourth above-described property, to wit, block (98) of the said city of Phœnix, assigned, transferred, and set over to defendant, D. H. Pinney the said sheriff's certificate of sale
31 thereof and all his rights thereunder.

XIV.

That thereafter, to wit, on June 16th, 1884, the said sheriff, in pursuance of said sheriff's sale, executed and delivered to the defendant, Robert Garside, a sheriff's deed for the first above-described property, to wit, the southeast quarter of section thirty-three (33), township two (2) north, range three (3) east, of Gila and Salt river meridian, and since then, to wit, on May 20th, 1887, the defendant, Robert Garside, sold and conveyed the same to defendant, J. De Barth Shorb, who is now in possession and pretends to be the owner thereof.

That on June 10th, 1884, the said sheriff, in pursuance of said sheriff's sale and assignment of certificate of sale by said defendant Kales, executed and delivered to the defendant, J. T. Simms, a sheriff's deed for the second above-described property, to wit, the northeast quarter of section five (5), township one (1) north, range three (3) east, Gila and Salt river meridian; and since then, to wit, on February 28th, 1887, defendant, J. T. Simms, and defendant, Hannah T. Simms, who is the wife of said J. T. Simms, sold and conveyed the same to defendant, George T. Brasius, who subdivided the same into blocks and lots, with streets running through the said
32 property, and the said property, to wit, the said northeast quarter of section 5, township one (1) north, range three (3) east, Gila and Salt river meridian, is now commonly known and designated as "Central Place," and of the blocks and lots thus composing said "Central Place," the said defendant, George T. Brasius, did, on May 3rd, 1887, sell and convey unto the defendant, John W. Jeffries, that portion commonly known and designated as lot number two (2), of block number twelve (12), in said "Central Place," and on May 5th, 1887, to defendant, Henry W. Ryder, that portion commonly known and designated as lot number one (1), of block number eighteen (18), in said Central Place; that on June 19th, 1884, the said sheriff, in pursuance of said sheriff's sale, executed and delivered to the defendant, William Gilson, a sheriff's deed for the

third above-described property, to wit, the southeast quarter of section nine (9), township one (1) north, range three (3) east, of Gila and Salt river meridian, and since then, to wit, on April 6th, 1886, the defendants, William Gilson and Lizzie Gilson, who is the wife of said William Gilson, sold and conveyed the same to defendant, Cordelia L. Beckett, who is the wife of the defendant, C. G. Beckett, and who is now in possession and pretends to be the owner thereof.

That on June 16th, 1884, the said sheriff, in pursuance of said sheriff's sale and the said assignment of certificate of sale of
33 said Kales, executed and delivered to the defendant, D. H. Pinney, a sheriff's deed for the fourth above-described property, to wit, block number 98, of the said city of Phœnix, who, on September 10th, 1886, sold and conveyed a portion thereof, commonly known as lot 10, in said block, of the city of Phœnix, to the defendant, The Bank of Napa, which plaintiff alleges to be a corporation incorporated and existing under and by virtue of the laws of the State of California.

And the said defendant, D. H. Pinney, on November 18th, 1886, sold and conveyed another portion of said block 98, commonly known as lots numbers one, three, five, seven, and nine of said block number 98, of the said city of Phœnix, to the defendant, F. Q. Story, who, on December 6th, 1886, sold and conveyed the same and all of last-mentioned lots to defendant, M. H. Sherman, who is now in possession and pretends to be the owner thereof.

XV.

That at the time of the death of the said Jonathan M. Bryan, Vine Bryan was and for a long time prior thereto had been the wife of said Jonathan M. Bryan, *and* deceased, and did him survive without issue, and the said Jonathan M. Bryan left no descendants.

XVI.

That all and each of the lots, pieces, and parcels of land
34 above in this complaint described was acquired by the said Jonathan M. Bryan after and during the marriage between him and the said Vina Bryan, and was, at the time of the death of the said Jonathan M. Bryan, the common property of the said Jonathan M. Bryan and the said Vina Bryan, his wife, and upon his death she became and was his sole heir and upon her all of the sole common property did then and there descend and in her remain until the 29th day of June, 1887, when by two certain deeds of conveyance by her made, executed, and delivered to the plaintiff, Thomas J. Bryan, for a good and valuable consideration, she did grant, convey, remise, release, and forever quitclaim unto this said plaintiff all of the lands above herein described, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining and the rents, issues, and profits thereof, and also all the estate, right, title, and interest, claim of homestead, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said Vina Bryan of,

in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold under him, the said plaintiff, his heirs and assigns forever; and the said Vina Bryan did never at any time consent to or affirm any of the sales, deeds, certificates of sale, conveyances, or proceedings made by any of
35 the defendants or the said district or probate court or the said sheriff, but always affirmed and does now affirm, and her grantee, this plaintiff, always did and does now affirm, that all such last-mentioned sales, deeds, certificates of sale, conveyances, and proceedings by the said defendants or any of them or by the said district court, probate court, or sheriff were unwarranted, against equity, and without authority of law.

XVII.

That — all of the facts herein alleged the defendants and each of them, at all the times herein mentioned, had full notices; that the defendant, D. H. Pinney, was the judge of the said district court and acted as such in all the proceedings had in the said action, wherein said defendant, M. W. Kales, was plaintiff and said M. W. Kales as administrator of the estate of J. M. Bryan, deceased, was defendant; and said defendant, D. H. Pinney, rendered and made the said decree of foreclosure and order of sale therein and was so the judge of said district court at the time of the assignment to him by said defendant, M. W. Kales, of the sheriff's certificate of sale of said block number 98, in said city of Phœnix, and also at the time of the execution and delivery to him by the said sheriff of the said sheriff's deed thereof.

XVIII.

36 That the premises described in this complaint are of the value of $125,000.

Wherefore plaintiff prays—

First. That all the proceedings, judgment, decree, and order of sale had, made, rendered, or entered by the said district court in the said action wherein said M. W. Kales was plaintiff and said M. W. Kales, administrator of the estate of J. M. Bryan, deceased, was defendant be annulled, set aside, and declared void.

Second. That the said sale of the property described in this complaint made by the said sheriff and the said certificates of sale and the said sheriff's deeds made, executed, and delivered to the defendants, M. W. Kales, Robert Garside, Wm. Gilson, D. H. Pinney, J. T. Simms, be annulled, set aside, and declared void and the parts and portions of said property conveyed or attempted to be conveyed thereunder to the defendant herein be decreed to have been received by them and each of them with notice and in trust for the said Vina Bryan and her grantee, this plaintiff.

Third. That it be adjudged and decreed that each and all of the defendants respectively now pretending to claim or own the above-described lands or any portion thereof do hold the same and each portion so claimed by them respectively in trust for this plaintiff.

Fourth. That it be adjudged and decreed that each of
37 the defendants claiming to own any portion of the lands described herein do convey to the plaintiff the portions so claimed by each respectively upon the plaintiff doing whatever this court may decree he should equitably do.

Fifth. That any and all estate and interest claimed by the defendants or any of them in the above-described premises be devested from said defendants and each of them, and that the same and all thereof be vested in this plaintiff.

Sixth. That it be adjudged and decreed that the defendants and each of them be enjoined and commanded to refrain from selling, conveying, mortgaging, or in any way interfering with said premises or from asserting any claim or title thereto in any way or at any time or from receiving any money or property on account of said property or any attempted transfer of the same.

Seventh. That this plaintiff have such other and further relief and may be decreed and permitted to do all that is fair, just, and equitable in the premises, and for costs.

CAMERON H. KING.

GOODRICH, SMITH, STREET & GOODRICH,
Attorneys for Plaintiff.

Indorsements: Filed July 18th, 1887. J. E. Walker, clerk.

38 (Title of court and cause.)

Original Answer of M. W. Kales.

Now comes defendant, M. W. Kales, by his attorneys, and, answering the plaintiff's complaint filed herein, for himself alleges—

I.

The defendant says that he improperly joined in this action with all and each one of the other defendants therein, because he says that the complaint does not show any joint or common interest in the subject-matter of the action between this defendant and all or either of his said codefendants.

II.

The defendant says that when this action was commenced there was another action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa by the said T. J. Bryan for the same supposed cause of action and for the recovery of the same lands described in the complaint, which said action is still pending.

III.

The defendant says that the plaintiff should not be allowed to maintain this action without joining with him as plaintiffs Cameron

H. King, E. J. Edwards, Ben. Goodrich, Briggs Goodrich, and
39 Webster Street, because prior to the commencement of this action, to wit, on the fourth day of July, 1887, said T. J. Bryan (the plaintiff herein) sold and conveyed by quitclaim deed to said Cameron H. King and E. J. Edwards an undivided one-half of his pretended interest and alleged title in and to all of the land described in plaintiff's complaint except the northeast quarter of section (5) five, township (1) one north, range (3) three east, Gila and Salt river meridian. On the same day (July 4th, 1887) the said T. J. Bryan by quitclaim deed conveyed an undivided one-half of his pretended interest and alleged title in and to the northeast quarter of section (5) five, township (1) one north, range (3) three east, Gila and Salt river meridian, to Cameron King, and on July 18th, 1887, the said Cameron King by quitclaim deed conveyed an undivided one-fourth of his pretended interest in and to the northeast quarter of section (5) five, township (1) one north, range (3) three east, Gila and Salt river meridian, to Ben. Goodrich, Briggs Goodrich, and Webster Street.

VI.

The defendant excepts to the plaintiff's complaint and says the same is insufficient in law to *the* require him to answer thereto, and of this he prays judgment of the court that he go hence without delay and recover his costs in this behalf expended.

40 V.

The defendant says that the pretended interest and title through and by which plaintiff claims the lands described in the complaint was acquired by said plaintiff while the defendants, Garside, Shorb, Simms, Brasius, Jeffries, Ryder, Beckett, Pinney, Bank of Napa, Story, and Sherman, were in the peaceable and adverse possession of said lands, — which said lands the plaintiff has never been in possession.

VI.

The defendant says the plaintiff ought not to have and maintain this action, because the defendants, by themselves and through their grantors, have had and held peaceable and adverse possession under title of the lands described in the complaint for more than three years next before the commencement of this action.

VII.

For another defense defendant alleges that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona.

VIII.

The defendant says that the plaintiff ought not to be *admitted* to allege that he is the owner in fee or otherwise, or that he has
41 any interest, right, or title whatever in or to the lands described in the complaint or any part thereof through or by any conveyance from the said Vina Bryan, because he alleges that on the 16th day of October, 1883, a judgment was duly rendered and made in and by the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa, in which said action the defendant was the plaintiff, and in his capacity as administrator of the estate of J. M. Bryan, deceased, he was the defendant, to foreclose four certain mortgages executed by the said J. M. Bryan prior to his death, in which said judgment and after a full and fair hearing by the said court of all the facts it was ordered, adjudged, and decreed in plaintiff's complaint herein *and* that the same be sold at sheriff's sale to satisfy the amounts specified in such judgment, and thereafter an order of sale was duly issued out of said court commanding the sale of all the lands described in plaintiff's complaint herein at sheriff's sale under such judgment, and the said lands were thereafter duly sold at sheriff's sale under such judgment, and the same nor any part thereof was ever redeemed; that the lands described in plaintiff's complaint herein are the same lands set out in such judgment, order of sale, and are the same lands sold by the sheriff thereunder.

42 IX.

The defendant says that the plaintiff ought not to be *admitted* to allege that he is the owner in fee or otherwise, or has any interest, right, or title whatever in or to the lands described in his complaint or any part thereof by or through any conveyance from Vina Bryan, because defendant alleges that the defendant — heretofore, in the month of September, 1883, appointed administrator of the estate of J. M. Bryan, deceased, by the probate court of Maricopa county, Arizona, at the request of his widow, the said Vina Bryan; that in due course of administration and at the proper time this defendant as such administrator exhibited to the said probate court (which court has sole jurisdiction in the premises) a full, true, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by this defendant as such administrator in relation to all the lands described in the plaintiff's complaint; that the said Vina Bryan, the heir-at-law of said J. M. Bryan and plaintiff's grantor, had full and legal notice of the presentation and filing of said account and of the place and time fixed for the hearing, settlement, and approval thereof; that the said Vina Bryan then or thereafter made no objection to said final account or any part thereof, nor objected to its allow-
43 ance, settlement, or approval, but stood by silent and acquiesced in the same, and the said final account as exhibited,

filed, and rendered was duly settled, allowed, and approved by said probate court.

X.

The defendant says that the plaintiff ought not to be allowed to allege that he is the owner in fee or otherwise, or that he has any interest, right, or title whatever in or to the lands described in his complaint or any part thereof through or by any conveyance from Vina Brown (formerly said Vina Bryan), because defendant alleges that the said Vina Bryan at the time well knew of the pendency of the action and rendition of judgment therein as set out in plaintiff's complaint; that she well knew of the sale of said lands at sheriff's sale under such judgment as set out in the complaint, and that she well knew of the purchases at such sale, but in all of this she made no objection, but stood by and remained silent and acquiesced in the same for more than three years; and defendant says that his co-defendants under their respective purchasers of said lands entered into the actual possession thereof and have made large and valuable improvements thereon, all of which was well known to the said Vina Bryan, but she made no objection thereto, but stood by and remained silent and acquiesced therein for more than three years.

44 & 45 XI.

The defendant says that in the month of September, 1883, at the request of Vina Bryan, widow of J. M. Bryan, deceased, letters of administration were granted by the probate court of Maricopa county, Arizona, upon the estate of said deceased to this defendant, who thereupon qualified and entered upon the duties of such administration; that within the time provided by law creditors of the said J. M. Bryan, deceased, presented their claims — to law to this defendant as such administrator, who approved the same, which said claims were approved and allowed by the judge of said court; that the claims allowed by this defendant as such administrator and allowed by the said court as claims against the estate of the said J. M. Bryan, deceased, and entitled to payment out of the proceeds of said estate amount to the sum of $22,027.16; that the entire assets and proceeds of said estate were insufficient to pay the said claims in full, and that such proceeds were only sufficient to pay a *pro rata* of said claims, to wit, about forty-six per cent. (46%), and the same were paid only to the extent of only about 26%, leaving the balance of such claims against said estate still unpaid to the amount of about $11,880.45.

XII.

46 The defendant, for further answer to the complaint filed herein, denies that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, registered No. 326, was commenced before any or either of the notes set forth in the plaintiff's complaint was due or payable, or before they or either one of them had been presented to the probate judge or pro-

bate court of Maricopa county, or before they or either of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest on either or any of them or to sell any lands or personal property or any lands which had been mortgaged to secure the payment of said notes or either of them.

Denies that said suit was commenced while said administration had in his hands sufficient or any money whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either one of them.

Denies that the several sums paid for the several pieces of said land set out in plaintiff's complaint or that either of said sums was an inferior price for the land so purchased and bid for or was less than such land was worth in open market or otherwise, but alleges that the several sums paid for the said several pieces of land at such sheriff's sale was a full, fair, and reasonable price for the same.

47 Denies that the lands described in the plaintiff's complaint or any part thereof after the death of J. M. Bryan, deceased, descended to Vina Bryan, or that after the death of said J. M. Bryan the title thereto rested solely in Vina Bryan otherwise than subject to all the debts of said J. M. Bryan, deceased, and the mortgages and promissory notes set out in plaintiff's complaint; and he denies that any title, interest, or right whatever in or to the said lands or any part thereof rested in or remained in or to said Vina Bryan longer than or after the 19th day of June, 1884.

Denies that the plaintiff is the owner in fee or otherwise, or that he has any interest, right, or title to the lands described in his complaint or any part thereof.

Denies that the said Vina Bryan did not consent to or affirm the sales, deeds, certificates of sales, conveyances, or proceedings made by the defendants or either of them or of said district court or probate court or said sheriff; but, upon the contrary, he alleges that she consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by this defendant in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgment set forth in plaintiff's complaint, the sale of the lands therein set forth, and the execution of the deeds therein set forth.

48 Denies that said Vina Bryan did ever affirm that the said sales or either one of them, deeds, certificates of sale, conveyances, or proceedings by the said district court or probate court or sheriff of this defendant were unwarranted, against equity, or without authority of law, or that the same were or are unwarranted, against equity, or without authority of law.

The defendant, having fully answered, prays judgment that plaintiff take nothing in this action, and that defendant go hence without delay, with his costs recovered.

BAKER & CAMPBELL AND
CLARK CHURCHILL,
Att'ys for Defendant.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

G. W. Hoadley, being duly sworn, says that he is the agent of M. W. Kales, one of the defendants in the above-entitled action, who is not now within the Territory of Arizona; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

G. W. HOADLEY.

Subscribed and sworn to before me this first day of September, A. D. 1887.

J. E. WALKER,
Clerk District Court.

Indorsed: Filed Sept. 1st, 1887. J. E. Walker, clerk.

49 Title of court and cause.

Demurrer and Answer of L. H. Orme.

Now comes L. H. Orme, one of the above-named defendants, for himself, and, by his attorney, Frank Cox, submits the following demurrer and answer to plaintiff's complaint on file herein in the above-entitled action:

First. That said complaint does not state facts sufficient to constitute a cause of action against the defendant Orme as sheriff or otherwise or at all.

Second. That, answering plaintiff's complaint, defendant Orme denies each and every allegation in said complaint contained.

Wherefore he prays that he may go hence with his costs in this behalf expended.

FRANK COX,
Att'y for L. H. Orme.

Indorsed: Filed Sept. 8th, 1887. J. E. Walker, clerk.

50 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

THOMAS J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASINS, Impleaded with M. W. KALES, L. H. ORME (Sheriff), ROBERT GARSIDE, and Others, Defendants. } No. 765.

Now comes the above-named defendant, Robert Garside, and, answering the complaint of the above-named plaintiff, alleges—

For a first defense.

The defendant excepts to the plaintiff's complaint and says the same is insufficient in law to require him to answer thereto, and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

2.

Defendant alleges that the pretended interest and title through and by which plaintiff claims the lands described in the complaint and hereinafter described was acquired by said plaintiff while this defendant was in the peaceable and adverse possession of said lands, of which said lands or any part thereof plaintiff has never been in possession; and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

3.

51 (1.) Defendant alleges that plaintiff ought not to have or maintain this action, because this defendant has had and has held peaceable and adverse possession of the lands described in the complaint and hereinafter described under title thereto for more than three years next before the commencement of this action.

(2.) For another defense defendant alleges that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provisions of sub. 4, sec. 14, act No. 100 of the 11th Legislative Assembly of Arizona, and of this he is ready to verify, and prays judgment of the court that he go hence with his costs in this behalf expended.

4.

The defendant further says that plaintiff ought not to be allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, plaintiff's grantor, appointed administrator of the estate of J. M. Bryan, deceased, who is mentioned and referred to in the complaint by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited
52 to the said probate court (which court had sole jurisdiction in the premises), a full, true, complete, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to said estate and the property and affairs thereof, in which final account said administrator reported to said court, among other things, that the tract of land in said complaint described as follows, to wit, the southeast quarter of section thirty-three (33), township two north, range three east, of Gila and Salt river meridian, had been sold to pay the mortgage thereon, which

is referred to in the complaint; that the said Vina Bryan (wife and heir-at-law of said deceased) and plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time and place for the hearing and settlement and approval thereof by said probate court, but that said Vina Bryan then or thereafter made no objection to the said account or any part thereof nor objected to *its* allowance thereof, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said
53 administrator and said decree and judgment of said probate court are hereby referred to and made part hereof.

5.

Defendant further alleges that said Vina Bryan well knew of the sale of said southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, under and by virtue of the judgment set forth in the complaint in this action, and of the purchase thereof by this defendant and of his entry into possession thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by this defendant, but she made no objections thereto or claimed any interest in said lands, but remained silent; that this defendant purchased said lands for the sum of fifteen hundred dollars from the sheriff of Maricopa county, Arizona, which said Vina Bryan well knew and she made no objections thereto nor made any claim to said land; that this defendant entered into the possession of said land under said sale, which said Vina Bryan well knew; that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced there*to*; that this defendant made valuable improvements upon said lands to the amount of upwards of three thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced there*to*.

54 & 55 6.

For a further defense defendant alleges that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of said J. M. Bryan, deceased, to one M. W. Kales, who thereupon qualified and entered upon the duties of such administrator; that within the time prescribed by law creditors of the said J. M. Bryan presented their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed and allowed by the probate court as claims against the estate of said J. M. Bryan and entitled to the payment out of the proceeds of said estate amounted to

the sum of forty-two thousand two hundred and thirty-six ninety-three hundredths dollars; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from the said estate *was* insufficient to pay the creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made a decree
56 and order requiring said administrator to distribute the proceeds of said estate among said creditors at said rates, which was so done, leaving said creditors unpaid in the sum of eleven thousand seven hundred and eighty forty-five hundredths dollars, which said indebtedness of said J. M. Bryan still remains unpaid.

7.

For a further answer defendant denies that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before any or either of the notes set forth in plaintiff's complaint was due or payable, or before they or either one of them had been presented to the probate court or probate judge of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest or any of them, or to sell any lands or personal property or any lands which had been mortgaged to secure the payment of said notes or either of them.

Denies that said suit was commenced while said administrator had in *the* hand sufficient or any funds whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

57 Denies that the amount bid by the defendant Garside, at the sheriff's sale referred to in the plaintiff's complaint, for said southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or less than it would have brought at a regular or usual sheriff's sale or otherwise, but avers that the same was a full and reasonable price for said land and all the same was worth.

Denies that the lands mentioned in plaintiff's complaint, to wit, the southeast quarter of section thirty-three, township two north, range three east, Gila and Salt river meridian, or any part thereof, after the death of said J. M. Bryan, the title thereto or any part thereof vested in Vina Bryan, but avers that the same was subject to the mortgage set forth in plaintiff's complaint, and the same was sold to pay said mortgage and all and every right, title, or interest said J. M. Bryan or his estate had therein was divested and alienated, and neither said estate nor the heirs of said Bryan have had any right, title, or interest in said property since the 5th day of November, 1884, and denies that plaintiff is the owner in fee or otherwise of the said southeast quarter of section thirty-three, township

two north, range three east, of Gila and Salt river meridian,
58 or any part thereof, and alleges that the said defendant, Robert Garside, purchased said land at sheriff's sale, under the judgment set forth in plaintiff's complaint, on the 15th day of December, 1883, for the sum of fifteen hundred dollars, which was a fair, reasonable, and just price for said land and all that the same was then worth; that said land was not redeemed from said sale, and thereafter and after the time for redemption had expired the said sheriff, for and in consideration of said sum of fifteen hundred dollars bid and paid by the defendant Garside to said sheriff for said property, duly made and executed his deed, whereby he conveyed said southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, unto the defendant Garside, who thereby became and was on the 16th day of June, A. D. 1884, the owner thereof, and entered into possession of and commenced to improve said tract of land, and continued in possession and occupancy thereof from thence to the commencement of this action, and he still remains in possession of said premises; that said land, by reason of the improvements made thereon by this defendant, greatly increased in value, and on or about the 16th day of June, A. D. 1887, this defendant Garside granted, bargained, sold, and conveyed said tract of land for the sum of sixteen thousand dollars unto J. De Barth Shorb.

This defendant denies that Vina Bryan did not consent to
59 or affirm the sales, deeds, certificates of sale, conveyances, or proceedings made by the defendants or any of them or the said district or probate court or said sheriff; but, upon the contrary, said defendant alleges that Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in said probate or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgment set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Denies that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, proceedings by the said defendants or by the said probate or district court or sheriff were unwarranted, against equity, or without authority of law, or that the same are or were unwarranted, against equity, or without authority of law.

Denies that this delendant had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgages mentioned in said complaint, the judgment of foreclosure of said mortgages, the sale of said lands described in paragraph four of this answer, the issuance of the sheriff's certificate of sale thereunder, and of the execution of the deed therefor.

60 That on the 15th day of December, A. D. 1883, the estate of one J. M. Bryan, deceased, was the owner in fee simple of the lands and premises described in the complaint as the southeast quarter of section thirty-three, township two north, range three east, free from all incumbrances except the mortgage thereon mentioned in the complaint as having been given to one M. W. Kales by said Bryan

in his lifetime and the suit mentioned in said complaint brought to foreclose said mortgage and the decree rendered in said suit foreclosing said mortgage and the order of the district court mentioned in said complaint directing the sheriff of Maricopa county to sell said property to satisfy said mortgage decree and costs, and said sheriff did thereupon and on said above-mentioned day duly offer said property for sale at public auction; that said decree and judgment of said court appeared to be in due form, regular, and valid, and entitled to full faith and credit and to authorize said sheriff to sell the said property, and this defendant did thereupon, in good faith, bid and pay to said sheriff the sum of fifteen hundred dollars for said property and receive the certificate of sale of said sheriff therefor; that the said sum of fifteen hundred dollars was actually paid by this defendant to said sheriff on the date of said certificate;
61 that this defendant had not, at or before the time of the said sale and delivery of said certificate or of the payment of the purchase-money, any knowledge or notice whatever, either express or implied, that the plaintiff in the suit or action referred to in the complaint which was brought to foreclose said mortgage was the same identical person who was named as the defendant in said suit or action, or that there was any defect in the parties or proceedings in said action.

Wherefore this defendant prays judgment that plaintiff take nothing by his action, and that defendants go hence without delay and recover their costs herein from plaintiff.

CLARK CHURCHILL,
Att'y for Def't.

TERRITORY OF ARIZONA, }
County of Maricopa, }

Robert Garside, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer by his attorney subscribed; that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

ROBERT GARSIDE.

Subscribed and sworn to before me this 26th day of September, A. D. 1887.

[SEAL.] W. D. FULWILER,
Notary Public.

Indorsed: Filed October 22d, 1887. J. E. Walker, clerk.

62 (Title of court and cause.)

Original Answer of Defendants, William Gilson, Lizzie E. Gilson, Cordelia Beckett, and C. G. Beckett

Now come the defendants, William Gilson, Lizzie E. Gilson, Cordelia L. Beckett, and J. C. Beckett, and for themselves alone make answer to plaintiff's complaint filed herein as follows:

I.

Defendants aver that this plaintiff should not be allowed to maintain this action without joining with him as plaintiffs one Cameron King and one E. J. Edwards, because prior to the commencement of this action, to wit, on the fourth day of July, 1887, said T. J. Bryan (the plaintiff herein) sold and conveyed by quitclaim deed to said Cameron King and said E. J. Edwards an undivided one-half of his pretended interest and alleged title in and to the south-east quarter of section (9) nine, township (1) north, range (3) three east, Gila and Salt river meridian, part of the lands described in his complaint, and of which the defendant, Cordelia L. Beckett, is the owner.

II.

For another defense defendants except to plaintiff's complaint and say the same is insufficient in law to require them to answer thereto; and of this they pray judgment of the court.

63

III.

For another defense defendants allege that plaintiff ought not to have and maintain this action, because defendants, Cordelia L. Beckett and C. G. Beckett, and their grantors, William Gilson and Lizzie E. Gilson, have had and held peaceable and adverse possession under title of the lands described in paragraph I of this answer for more than three years before the commencement of this action.

IV.

For another defense defendants allege that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona; and of this they are ready to verify, and pray judgment of the court that they go hence with their costs in this behalf expended.

V.

For another defense defendants allege that the pretended interest*ed* and title through and by which plaintiff claims the lands described in paragraph I of this answer was acquired by said plaintiff while defendants were in the peaceable and adverse possession of said land, and of which said land or any part thereof plaintiff has never been in possession.

64

VI.

Defendants further say that plaintiff ought not to be allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, appointed administrator of the estate J. M. Bryan, deceased, by the probate

court of Maricopa county, Arizona; that in due course of administration and at the proper time said administrator, M. W. Kales, exhibited to the said probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his action as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to said lands described in paragraph I of this answer; that the said Vina Bryan (wife and heir-at-law of said deceased) had full and legal notice of the presentation and filing of said account and of the time and place fixed for the hearing, settlement, and approval thereof; that the said Vina Bryan then or thereafter made no objection to the said account or any part thereof, nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court.

VII.

Defendants further allege that said Vina Bryan well knew
65 of the sale of said S. E. one-fourth of section 9, T. 1 N., R. 3 E., G. & S. R. M., under and by virtue of the judgment set forth in the complaint in this action and of the purchase thereof by William Gilson and of his entry into possession thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by said Cordelia Beckett, but she made no objection thereto or claimed any interest in said lands, but remained silent; that said Cordelia Beckett purchased said lands for the sum of $4,000 from said William Gilson, which said Vina Bryan well knew, and she made no objection thereto nor made any claim to said land; that said Cordelia Beckett entered into the possession of said land under said sale, which Vina Bryan well knew; that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced *thereto;* that said Cordelia Beckett made valuable improvements upon said lands to the amount of $3,000, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced *thereto.*

VIII.

For further defense defendants allege that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased) letters of administration were granted by the probate court of Maricopa county upon the estate of said J. M.
Bryan, deceased, to M. W. Kales, who thereupon qualified and
66 entered upon the duties of such administrator; that within the time prescribed by law creditors of the said Bryan, deceased, presented their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed by the probate court as claims against the estate of

said J. M. Bryan and entitled to payment out of the proceeds of said estate amounted to the sum of $22,027.16; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from the said estate *was* insufficient to pay the cr'd's of said estate in full, and that said proceeds *was* only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made an order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was done, leaving said creditors unpaid in the sum of $11,880.45, which said indebtedness of said J. M. Bryan, deceased, still remains unpaid.

IX.

For a further answer defendants deny that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326*m*, was commenced before any or either
67 of the notes set forth in plaintiff's complaint was due or payable, or before they or either one of them had been presented to the probate judge or probate court of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest on any of them or to sell any lands or personal property or any lands which had been mortgaged to secure the payment of said notes or either of them.

Deny that said suit was commenced while said administrator had in his hand sufficient or any funds whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Deny that the amount paid or bid by the said William Gilson at the sheriff's sale referred to in plaintiff's complaint for said S. E. one-fourth of sec. 9, T. 1 N., R. 3 E., Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or otherwise, but that the same was a full and reasonable price for said land.

Deny that the lands mentioned in plaintiff's complaint, to wit, the S. E. one-fourth of sec. (9) nine, T. 1 N., of R. 3 east, Gila and
68 Salt river meridian, or any part thereof after the death of said J. M. Bryan — the title thereto rested solely in Vina Bryan otherwise than subject to the debts of said J. M. Bryan, deceased, and the said mortgages set forth in plaintiff's complaint; and defendants deny that any title to said land rested in or remained to or in Vina Bryan longer than or after the 19th day of June, 1884.

Deny that plaintiff is the owner in fee or otherwise of the said S. E. one-fourth of sec. 9, T. 1 N., R. 3 E., Gila and Salt river meridian, or any part thereof, and allege that the said William Gilson purchased said land at sheriff's sale under the judgment set forth in plaintiff's complaint on the 15th day of December, 1883, for the sum of $1,850, which was a fair, reasonable, and just price for said land;

that thereafter the said William Gilson sold and conveyed said land to the defendant, Cordelia Beckett, who is now the owner thereof.

Deny that the said Vina Bryan did not consent to or affirm the sales, deeds, certificates of sale, conveyances, or proceedings made by the defendants or any of them — of the said district or probate court or said sheriff; but, upon the contrary, said defendants allege that said Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by the said M. W. Kales, administrator, in rela-
69 tion to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgments set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Deny that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, and proceedings by the said defendants or by the said probate or district court or sheriff were unwarranted, against equity, or without authority of law, or that the same were or are unwarranted, against equity, or without authority of law.

Deny that these defendants had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgages mentioned in said complaint, the judgment of foreclosure of said mortgage, the sale of said lands described in paragraph I of this answer, the issuance of the sheriff's certificates of sale thereunder, and of the execution of the deed therefor.

Defendants further allege that said William Gilson and Cordelia Beckett purchased said land in good faith, for a valuable consideration, and without any notice of any defect in the title, if any there be.

Having fully answered, defendants pray that the plaintiff take nothing by this action, and that defendants have judgment for their costs.

BAKER & CAMPBELL,
Att'ys for Def'ts.

70 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

C. G. Beckett, being duly sworn, says that he is one — the defendants in the above-entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

C. G. BECKETT.

Subscribed and sworn to before me this 31st day of August, A. D. 1887.

[SEAL.] J. E. WALKER,
Clerk Dist. Court.

Indorsed: Filed August 31st, 1887. J. E. Walker, clerk.

71 (Title of court and cause.)

Separate Answer of Defendant, J. DeBarth Shorb. No. 765.

Now comes the above-named defendant, J. De Barth Shorb, and, answering the complaint of the above-named plaintiff, alleges—

I.

The defendant excepts to the plaintiff's complaint and says the same is insufficient in law to require him to answer thereto, and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

II.

Defendant alleges that the pretended interest and title through and by which plaintiff claims the lands described in the complaint and hereinafter described was acquired by said plaintiff while this defendant was in the peaceable and adverse possession of said lands, of which said lands or any part thereof plaintiff has never been in possession, and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

III.

(1.) Defendant alleges that plaintiff ought not to have or maintain this action, because this defendant has had and has held peaceable and adverse possession of the lands described in the complaint and hereinafter described under title thereto for more than
72 three years next before the commencement of this action.

(2.) For another defense defendant alleges that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provision of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona, and of this he is ready to verify, and prays judgment of the court that he go hence with the costs in this behalf expended.

IV.

The defendant further says that plaintiff ought not to be allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, plaintiff's grantor, appointed administrator of the estate of J. M. Bryan, deceased, who is mentioned and referred to in the complaint, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited to the said probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth

the action had and done by said administrator in relation to
73 said estate and the property and affairs thereof; in which final account said administrator reported to said court, among other things, that the tract of land in said complaint described as follows, to wit, the southeast quarter of section thirty-three (33), township two north, range three east, of Gila and Salt river meridian, had been sold to pay the mortgage thereon, which is referred to in the complaint; that the said Vina Bryan (wife and heir-at-law of said deceased) and plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time and place for the hearing, settlement, and approval thereof by said probate court, but that the said Vina Bryan then or thereafter made no objection to the said account or any part thereof, nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said administrator and said decree and judgment of said probate court are hereby referred to and made part hereof.

V.

Defendant further alleges that said Vina Bryan well knew of the sale of said southeast quarter of section thirty-three, township
74 two north, range three east, of Gila and Salt river meridian under and by virtue of the judgment set forth in the complaint in this action and of the purchase thereof by the defendant, Robert Garside, and of his entry into possession thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by the defendant, Robert Garside, but she made no objection thereto or claimed any interest in said lands, but remained silent; that this defendant purchased said lands for the sum of sixteen thousand dollars from said Robert Garside, which said Vina Bryan well knew, and she made no objection thereto nor made any claim to said land; that defendant Garside entered into the possession of said lands under said sale, which said Vina Bryan well knew; that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced thereto; that the defendant, Robert Garside, made valuable improvements upon said lands to the amount of upwards of three thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced thereto.

6.

For a further defense defendant alleges that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of said
75 J. M. Bryan, deceased, to one M. W. Kales, who thereupon qualified and entered upon the duties of such administra-

tor; that within the time prescribed by law creditors of the said J. M. Bryan presented their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed and allowed by the probate court as claims against the estate of said J. M. Bryan and entitled to the payment out of the proceeds of said estate amounted to the sum of forty-two thousand two hundred and thirty six ninety-three hundredths dollars; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from the said estate was insufficient to pay the creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claims, to wit, forty-six per cent (46%) thereof, that the said probate court duly made a decree and order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was so done, leaving said creditors unpaid in the sum of eleven thousand seven hundred and eighty forty-five hundredths dollars, which said indebtedness of said J. M. Bryan still remains unpaid.

7.

76 For a further answer defendant denies that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before any or either of the notes set forth in plaintiff's complaint was due or payable or before they or either one of them had been presented to the probate court or probate judge of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest or any of them, or to sell any lands or personal property or any lands which had been mortgaged to secure the payment of said notes or either of them.

Denies that said suit was commenced while said administrator had in his hands sufficient or any funds whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Denies that the amount bid by the defendant Garside at the sheriff's sale referred to in the plaintiff's complaint for said southeast quarter of section thirty-three, township two north, range three east of Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or less than it would have brought at a regular or usual sheriff's sale or otherwise, but

77 avers that the same was a full and reasonable price for said land and all the same was worth.

Denies that the lands mentioned in plaintiff's complaint, to wit, the southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, or any part thereof, after the death of said J. M. Bryan the title thereto or any part thereof vested in Vina Bryan, but avers that the same was subject

to the mortgage set forth in plaintiff's complaint, and the same was sold to pay said mortgage, and all and every right, title, or interest said J. M. Bryan or his estate had therein was divested and alienated, and neither said estate nor the heirs of said Bryan have had any right, title, or interest in said property since the 5th day of November, 1884; and denies that plaintiff is the owner, in fee or otherwise, of the said southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, or any part thereof, and alleges that the said Robert Garside purchased said land at sheriff's sale, under the judgment set forth in plaintiff's complaint, on the 15th day of December, 1883, for the sum of fifteen hundred dollars, which was a fair, reasonable, and just price for said land and all that the same was then worth; that said land was not redeemed from said sale, and thereafter and after the time for redemption had expired, the said sheriff, for and in consideration of
78 said sum of fifteen hundred dollars bid and paid by the defendant Garside to said sheriff for said property, duly made and executed his deed, whereby he conveyed said southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, unto the defendant Garside, who thereby became and was, on the 16th day of June, A. D. 1884, the owner thereof and entered into possession of and commenced to improve said tract of land and continued in possession and occupancy thereof from thence until the commencement of this action, and he still remains in possession of said premises; that said land by reason of the improvements made thereon by this defendant greatly increased in value, and on or about the — day of ——, A. D. 1887, the defendant Garside granted, bargained, sold, and conveyed said tract of land for the sum of sixteen thousand dollars unto this defendant.

This defendant denies that Vina Bryan did not consent to or affirm the sales, deeds, certificates of sales, conveyances, or proceedings made by the defendants or any of them of the said district or probate court or said sheriff, but upon the contrary, said defendant alleges that said Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in said probate or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J.
79 M. Bryan, deceased, the recovery of the judgments set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Denies that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, proceedings by the said defendants or by the said probate or district court or sheriff were unwarranted, against equity, or without authority of law, or that the same are or were unwarranted, against equity, or without authority of law.

Denies that this defendant had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgages mentioned in said complaint, the judgment of foreclosure of said mortgages, the sale of said lands described in paragraph four of this answer, the issuance of the sheriff's certificate of sale thereunder, and of the execution of the deed therefor.

8.

80 The defendant alleges that on the 15th day of December, A. D. 1883, the estate of one J. M. Bryan, deceased, was the owner in fee simple of the lands and premises described in the complaint as the southeast quarter of section thirty-three, township two north, range three east, free from all incumbrances except the mortgage thereon mentioned in the complaint as having been given to one M. W. Kays by said Bryan in his lifetime, and the suit mentioned in said complaint brought to foreclose said mortgage, and the decree rendered in said suit foreclosing said mortgage, and the order of the district court mentioned in said complaint directing the sheriff of Maricopa county to sell said property to satisfy said mortgage, decree, and costs, and said sheriff did thereupon, and on the above-mentioned day, duly offer said property for sale at public auction; that said decree and judgment of said court appeared to be in due form, regular, and valid, and entitled to full faith and credit, and to authorize said sheriff to sell the said property, and the defendant Garside did thereupon in good faith bid and pay to said sheriff the sum of fifteen hundred dollars for said property and received the certificate of sale of said sheriff therefor; that the sum of fifteen hundred dollars was actually paid by the defendant Garside to said sheriff at the date of said certificate; that the defendant Garside had not at or before the time of the said sale and delivery of said
81 certificate or of the payment of the purchase-money any knowledge or notice whatever, either express or implied, that the plaintiff in the said suit or action referred to in the complaint which was brought to foreclose said mortgage was the same identical person who was named as the defendant in said suit or action, or that there was any defect in the parties or proceedings in said action.

9.

That on the 16th day of June, A. D. 1887, one Robert Garside was or pretended to be the owner in fee simple of the land described in said complaint as follows, to wit, the southeast quarter of section thirty-three, township two north, range three east, of Gila and Salt river meridian, free from all incumbrances, and he was then in the actual possession thereof; that this defendant, believing such to be the fact, on that day agreed with him for the purchase thereof in fee simple for the price of sixteen thousand dollars; whereupon the said Robert Garside conveyed the said premises to this defendant by his deed, dated on the — day of ——, A. D. 1887; that the sum of eight thousand dollars was actually paid to said Robert Garside by this defendant at the time of the delivery of said deed, to wit, on the 16th day of June, A. D. 1887, and the remainder of said purchase-money was also then and there paid by this defendant to said Robert
82 Garside by the execution and delivery of a promissory note of this defendant for the sum of eight thousand dollars, secured by mortgage upon said premises, which note is still standing as an obligation of this defendant; that this defendant had not, at or before the time of the said conveyance or of the said payment of

the purchase-money, any knowledge or notice whatsoever, either expressed or implied, that the plaintiff in the said suit or action referred to in the complaint which was brought to foreclose the said mortgage and referred to in said complaint was the same identical person who was named as the defendant in said suit or action, or that there was any defect in the parties or proceedings in said action or suit.

10.

This defendant avers that he is and ever has been a non-resident of the Territory of Arizona, and for many years past he has resided and still resides at San Gabriel, Los Angeles county, in the State of California; that he visited Maricopa county some time in the spring of the year 1887, and the tract of land described in said complaint as the southeast quarter of section thirty-three, township two north, range three east, Gila and Salt river meridian, was brought to his attention and he concluded to purchase the same, provided
83 he should thereafter be enabled to do so for a reasonable price, and to that end he arranged with the Valley Bank of Phœnix, a corporation organized under the laws of the Territory of Arizona and doing business at Phœnix, in said county of Maricopa, to effect said purchase on behalf of this defendant; that thereafter this defendant was informed by said banking-house that said bank had entered into an agreement, in behalf of this defendant, to purchase said tract of land from said Garside, and that said Garside had agreed to sell the same to this defendant for the price of sixteen thousand dollars, payable one-half cash on delivery of the deed and the remainder by the promissory note of this defendant, secured by mortgage on said premises, and this defendant, in order to carry out said agreement on his part, remitted to said bank the sum of eight thousand dollars, in lawful money of the United States, and his promissory note, payable to said Garside, and an indenture of mortgage upon said premises to secure the payment of said note, with instructions to pay said money and note secured by said mortgage to said Garside for said tract of land and accept the conveyance of said Garside of said land to and in behalf of this defendant only in case the title of said Garside should, upon investigation, be found perfect in fee simple; and defendant is informed and believes that one Webster Street, an attorney and counselor at law practicing in said county of Maricopa, was one of the attorneys of said banking-house, em-
84 ployed as such by the year to act as the attorney and counsel for said banking-house in all matters wherein it was concerned or called upon to transact business for its customers and patrons, and that in said capacity the question whether said title of said Garside to said tract of land, according to a certain abstract of the title to said land, which abstract was also submitted to the examination of said Street, was perfect and unencumbered, was referred to said Webster Street as an attorney and counselor at law and attorney for said banking-house, and that said Street undertook to examine the title to said tract of land as the same appeared by said abstract; said money or note was paid to said Garside or said mortgage was

delivered to him, and that thereafter, and before the payment of said money or note or delivery of said mortgage to said Garside in behalf of this defendant, the said Webster Street reported to said banking-house that he had examined the title of said Garside to said tract of land as the same appeared in and by said abstract, and that the title of said Garside of, in, and to said tract of land was perfect, and that, acting upon said report of said Webster Street as the attorney and counsel of said banking-house, the said banking-house paid said eight thousand dollars of the money of this defendant and the promissory note of this defendant and said mortgage upon said premises to secure said note to said Garside and accepted the
85 deed of said Garside conveying the said tract of land to this defendant; and affiant is further informed and believes that said Webster Street is one of the attorneys and counselors of the plaintiff in this action who brought and are maintaining this action against the defendant, and that in order to cause this action to be instituted by said Street and others as his attorneys the said plaintiff conveyed to said Street or some other person, whose name is unknown to this defendant, for the use of said Street, or that said plaintiff undertook to convey to said Street, or to some other person for his use, a large interest of, in, and to the claim or whatever right, title, or interest said plaintiff has or had of, in, or to said tract of land and of certain other lands, the claim, right, title, and interest of plaintiff whereto is based upon the same alleged facts as the claim, right, title, and interest of plaintiff of, in, and to said tract of land hereinabove described, and that at the time when said Street was employed by said banking-house to examine said title he was engaged in the practice of the profession of law in said county of Maricopa in copartnership with one Briggs Goodrich, one Benjamin Goodrich, and one Marcus A. Smith, under the firm name of Goodrich, Smith, Street and Goodrich, and that said firm last named are attorneys for plaintiff in this action, and that said firm has a large interest, by means of conveyance or conveyances or contract or contracts with said plaintiff, in
86 and to whatever claim, right, title, or interest plaintiff has of, in, or to the tract of land above described; and defendant is advised and believes that said Street and said firm are and ought to be estopped from prosecuting this action or asserting any claim, right, title, or interest of, in, or to said tract of land and every part thereof; and defendant is further informed and believes that said plaintiff procured a quitclaim deed or deeds of said several tracts of land described in said complaint from Vina Brown, who is mentioned in said complaint, within a few days after the purchase of said tract of land hereinabove described by this defendant from said Garside without the payment of any consideration therefor and for the sole purpose of bringing this and other actions for the recovery thereof.

11th defense.

This defendant avers that said plaintiff ought not to have or maintain this action, because the said Vina Bryan, plaintiff's grantor,

acquiesced in and ratified the sale of said tracts of land and all of them which are alleged in said complaint to have been sold by said sheriff of Maricopa county, and the execution of the sheriff's deed conveying said tracts of land to the several purchasers thereof, in this, to wit, the northeast quarter of section five, township one north, range three east, of Gila and Salt river meridian, one
87 George T. Brasius, the grantor of the purchaser thereof, caused said tract to be surveyed and subdivided into blocks, lots, streets, and alleys as and for town lots, and publicly advertised the same for sale, and sold divers and sundry persons nearly all the lots in said tract of land before the giving of said quitclaim deed by said Vina Brown to plaintiff, and among the persons who purchased lots in said tract were one Myra K. Olds and one George Tantau; that thereafter and on or about the 8th day of June, A. D. 1887, said Vina Brown, plaintiff's grantor, purchased said lot or lots which had previously been sold by said grantor of said original purchaser at said sheriff's sale, viz., George T. Brasius unto said Myra K. Olds, from said Myra K. Olds; and thereafter and on or about the 13th day of June, A. D. 1887, the said Vina Bryan, plaintiff's grantor, purchased said lot or lots which had previously been sold by the said Brasius to said George Tantau, and this defendant is informed and believes and so avers that said Vina Brown, plaintiff's grantor, did pay for said lot or lots so sold by said Brasius to said Myra K. Olds and George Tantau the sum of eighteen hundred dollars in lawful money of the United States.

For a twelfth defense.

And for a further defense and by way of cross-complaint this defendant avers that he is the owner, in possession, and en-
88 titled to the possession of the land described in said complaint as the southeast quarter of section thirty-three, in township two north, range three east, of Gila and Salt river meridian, and for more than five years last past he and his grantors and predecessors in interest have been the owners in the actual, open, notorious, exclusive, and adverse possession of said tract of land and every part thereof, and that said plaintiff claims and asserts an interest or interests therein adverse to this defendant, and particularly the allegations of his complaint herein, and that the claims and assertions of plaintiff are without any right whatever; that said plaintiff has not any right, title, or interest whatever in said land and premises or any part thereof, and that said claim of plaintiff is a cloud upon the title of defendant.

Wherefore defendant prays that said plaintiff may be required to set forth the nature of his claims, and that all adverse claims of said plaintiff may be determined by decree of this court, and that by said decree it be adjudged that this defendant is the owner and entitled to the possession and enjoyment of said premises, and that said plaintiff has no right, title, or interest whatever in or to said land or premises or any part thereof, and that said plaintiff be forever debarred from asserting any claim whatever in or to said land

and premises adverse to this defendant; that this defendant
89 do have and recover his costs herein, and for such other, further, and different relief as may be agreeable to equity and good conscience.

CLARK CHURCHILL,
Att'y for Def't Shorb.

STATE OF CALIFORNIA, }
County of Los Angeles. }

J. De Barth Shorb, being first duly sworn, says that he is the defendant named in the foregoing answer; that he has read the said foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters and things therein stated upon information and belief, and as to those matters he believes it to be true.

J. DE BARTH SHORB.

Subscribed and sworn to before me this 4th day of October, A. D. 1887.

[SEAL.] CHAS. H. DUNSMORE, *Clerk*,
By J. B. FANNING, *Deputy*.

Endorsed: Filed Oct. 22nd, 1887. J. E. Walker, clerk.

90 Title of court and cause.

Separate Answer of J. T. Simms and Hannah T. Simms.

Now comes the above-named defendants, J. T. Simms and Hannah T. Simms, and, answering the complaint of the above-named plaintiff—

For a first defense.

The defendants except to the plaintiff's complaint and say the same is insufficient in law to require them to answer thereto; and of this they pray judgment of the court that they go hence with their costs in this behalf expended.

For a second defense.

Defendants allege that the pretended interest and title through and by which plaintiff claims the lands described in the complaint was acquired by said plaintiff while these defendants were in the peaceable and adverse possession of said lands, of which said lands or any part thereof plaintiff has never been in possession; and of this they pray judgment of the court that they go hence with their costs in this behalf expended.

For a third defense.

I. Defendants allege that plaintiff ought not to have or maintain this action, because the defendants have had and have held peace-

able and adverse possession of the lands described in the complaint under title thereto for more than three years next before the commencement of this action.

91 II. For another defense defendants allege that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona; and of this they are ready to verify, and pray judgment of the court that they go hence with their costs in this behalf expended.

For a fourth defense.

The defendants further say that plaintiff ought not to be allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, plaintiff's grantor, appointed administrator of the estate of J. M. Bryan, deceased, who is mentioned and referred to in the complaint, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited to the said probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his action as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to said estate and the property and affairs thereof; in which final account said admin-

92 istrator reported to said court, among other things, that said tract of land in said complaint described had been sold to pay the mortgage thereon, which is referred to in the complaint; that the said Vina Bryan (wife and heir-at-law of said deceased) and plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time and place for the hearing, settlement, and approval thereof by said probate court, but that the said Vina Bryan then or thereafter made no objection to the said account or any part thereof nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said administrator and said decree and judgment of said probate court are hereby referred to and made part hereof.

For a fifth defense.

Defendants further allege that said Vina Bryan well knew of the sale of said northeast quarter of section five, township one north, of range three east, of Gila and Salt river meridian, under and by virtue of the judgment set forth in the complaint in this action, and of the purchase thereof by said J. T. Simms and of his entry into

possession thereof, to which she at no time made any objec-
93 tion, but acquiesced in the same; that she knew of the intended purchase of said lands by the defendant Simms, but she made no objection thereto or claimed any interest in said lands, but remained silent; that the defendant Brasius purchased said lands, together with certain other lands, for the sum of fifty-nine thousand dollars from said J. T. Simms, which said Vina Bryan well knew, and she made no objection thereto nor made any claim to said lands; that this defendant entered into the possession of said lands under said sale, which said Vina Bryan well knew; that she made no objection thereto nor made any claim to said lands, but remained silent and acquiesced thereto; that said J. T. Simms made valuable improvements upon said lands to the amount of upwards of one thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced thereto.

For a sixth defense.

For a further defense defendants allege that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of said J. M. Bryan, deceased, to M. W. Kales, who thereupon qualified and entered upon the duties of such administrator; that within the time pre-
scribed by law creditors of the said J. M. Bryan presented
94 their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed and allowed by the probate court as claims against the estate of J. M. Bryan and entitled to payment out of the proceeds of said estate amounted to the sum of forty-two thousand two hundred and thirty-six ninety-three hundredths —; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from the said estate were insufficient to pay the general creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made a decree and order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was so done, leaving said creditors unpaid in the sum of eleven thousand seven hundred and eighty forty-five hundredths dollars, which said indebtedness of said J. M. Bryan still remains unpaid.

Seventh defense.

For a further answer defendants deny that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before any or either of the notes set forth in plaintiff's complaint was due or payable,

or before they or either of them had been presented to the
95 probate judge or probate court of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate — for an order to pay said notes or either of them or the principal or interest on any of them or to sell any land or personal property or any lands which have been mortgaged to secure the payment of said notes or either of them.

Deny that said suit was commenced while said administrator had in his hands sufficient or any funds whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Deny that the amount bid by the said M. W. Kales at the sheriff's sale referred to in plaintiff's complaint for said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or otherwise or less than said land would have brought at a regular or usual sheriff's sale, but aver that the same was a full and reasonable price for said land and all the same was worth.

Deny that the lands mentioned in plaintiff's complaint, to wit, the northeast quarter of section five, township one north, of range three east, of Gila and Salt river meridian, or any part thereof after the death of said J. M. Bryan — the title thereto or any part thereof vested in Vina Bryan, but aver that the same was subject to the said mortgage set forth in plaintiff's
96 complaint, and the same was sold to pay said mortgage, and all and every right, title, or interest said J. M. Bryan or his estate had therein was divested and alienated, and neither said estate nor the heirs of said Bryan have had any right, title, or interest in said property since the 5th day of November, 1884, and denies that plaintiff is the owner in fee or otherwise of the said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, or any part thereof, and alleges that the said M. W. Kales purchased said land at sheriff's sale under the judgment set forth in plaintiff's complaint on the 15th day of December, 1883, for the sum of two thousand nine hundred and seventy-five dollars, which was a fair, reasonable, and just price for said land and all the same was then worth; that thereafter said M. W. Kales duly sold and assigned said certificate of sale received by him from said sheriff to the defendant, J. T. Simms, for the sum of over three thousand dollars, which said Simms paid to said Kales therefor, all of which said Vina Bryan had notice and well knew and made no objection thereto, but acquiesced therein; that thereafter said sheriff duly made and executed his deed whereby he conveyed said land known as the northeast quarter of section five, township one north, of range three east, of Gila and Salt river meridian, unto J. T. Simms, who thereby became and was on the 16th day of June, A. D. 1884, the owner thereof, and entered into possession and commenced to improve said tract of land, and
97 continued in the possession and occupancy and continued to

improve said land from thence until some time on or about the 28th day of February, A. D. 1887, when, said land, by reason of the improvements made upon it by said Simms, having increased in value, the said Simms and his wife, Hannah T. Simms, granted, bargained, sold, and conveyed said tract of land, together with certain other lands, to this defendant for the sum of fifty-nine thousand dollars, and this defendant thereupon entered into possession of said land as the owner thereof and caused the same to be surveyed and subdivided into blocks, lots, streets, and alleys as and for town lots, and publicly advertised the same for sale and sold to divers and sundry persons nearly all the lots in said tract of land before the commencement of this action, and among the persons who purchased lots in said tract were one Myra K. Olds and one George Tantau; that thereafter and on or about the 8th day of June, A. D. 1887, said Vina Bryan, plaintiff's grantor, now known as Vina Brown, purchased said lot or lots which had been previously sold by this defendant unto said Myra K. Olds from the said Myra K. Olds, and thereafter and on or about the 13th day of June, A. D. 1887, the said Vina Brown, plaintiff's grantor, purchased said lot or lots which had previously been sold by this defendant to said George Tantau; and these defendants are informed, believe, and so aver that said Vina Brown, plaintiff's grantor,
98 did pay for said lots so sold by this defendant to said Myra K. Olds and George Tantau the sum of eighteen hundred dollars in lawful money of the United States; that said Vina Brown, plaintiff's grantor, well knew and had notice of said sale of said premises by said Simms and wife to this defendant and the entering of this defendant into possession thereof, and of the surveying of said tract of land and the subdividing thereof into blocks, lots, streets, and alleys, and of the advertising and offering of said lots for sale and the selling of said lots composing said tract of land, and made no objection thereto, but acquiesced therein.

Deny that Vina Bryan did not consent to or affirm the sales, deeds, certificates of sale, conveyances, or proceedings made by the defendants or any of them — of the said district or probate court or said sheriff; but, on the contrary, said defendants allege that said Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgments set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Deny that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, or proceedings by the said
99 defendants or by the said probate or district court or sheriff or any or either of them were or was unwarranted against equity or without authority of law.

Deny that these defendants had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgages mentioned in said complaint, the judgment of foreclosure

of said mortgage, the sale of said lands described in paragraph five of this answer, the issuance of the sheriff's certificate of sale thereunder, and of the execution of the deed therefor at any time before the commencement of this suit.

Eighth defense.

And for a further and separate defense these defendants allege that heretofore, to wit, on or about the 13th day of June, A. D. 1884, one M. W. Kales was or pretended to be the owner of the certificate of sale issued by L. H. Orme, as sheriff of Maricopa county, of the tract of land described in the plaintiff's complaint as follows, to wit, the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, free from all incumbrances, and he then was in the actual possession thereof; that the defendant, J. T. Simms, believing such to be the fact, on that day agreed with him for the purchase thereof for the price of three thousand five hundred dollars; whereupon said M. W. Kales conveyed and signed the said
100 certificate to the said J. T. Simms by his deed and instrument in writing, dated on the 13th day of June, A. D. 1884; that the sum of three thousand five hundred dollars was actually paid by said Simms to said Kales at the time of the date of said assignment; that afterwards, to wit, on or about the 16th day of June, A. D. 1884, L. H. Orme, as sheriff of Maricopa county, pursuant to said certificate of sale and for and in consideration of the money bid by said Kales and paid by said Simms, did make, execute, and deliver unto said Simms his deed, whereby he did convey unto said Simms all the right, title, and interest of said J. M. Bryan at the said date of the execution of said mortgage, to wit, the 23rd day of February, 1883, which he or his estate acquired thereafter of, in, or to said premises or any part thereof; that said Simms thereupon entered into occupation and possession of said premises and improved the same and expended large sums of money in improving said land and premises, and continued in the actual possession thereof until on or about the 28th day of February, A. D. 1887; that said Simms had not at or before the time of the said conveyance and assignment to him by said Kales and the execution of said deed to him by said sheriff or of the payment of the purchase-money any notice whatever, either express or implied, that the plaintiff in the said suit or action referred to in the complaint which was brought to foreclose said
101 mortgage was the same identical person who was named as the defendant in said suit or action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said property, was the same identical person who was the administrator of the estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action.

Wherefore defendants pray judgment that they may go hence without delay, and for their costs herein.

CLARK CHURCHILL,
Att'y for Defendants.

COUNTY OF MARICOPA, } ss:
Territory of Arizona, }

J. T. Simms, being first duly sworn, says he is one of the defendants in the above-entitled cause; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except as to the matters and things therein stated upon information and belief, and as to those matters he believes it to be true.

J. T. SIMMS.

Subscribed and sworn to before me this 21st day of October, 1887.
[SEAL.] W. D. FULWILER,
Notary Public.

Endorsed: Filed Oct. 22nd, 1887. J. E. Walker, clerk.

102 Title of court and cause.

Separate Answer of John W. Jeffries and Henry W. Ryder.

Now come the above-named defendants, John W. Jeffries and Henry W. Ryder, and, answering the complaint of the above-named plaintiff, allege—

For a first defense.

The defendants except to the plaintiff's complaint and say the same is insufficient in law to require them to answer thereto; of this they pray judgment of the court that they go hence with their costs in this behalf expended.

For a second defense.

Defendants allege that the pretended interest and title through and by which plaintiff claims the lands described in the complaint was acquired by said plaintiff while these defendants were in the peaceable and adverse possession of said lands, of which said lands or any part thereof plaintiff has never been in possession; and of this they pray judgment of the court that they go hence with their costs in this behalf expended.

For a third defense.

I. Defendants allege that plaintiff ought not to have or maintain this action, because the defendants have had and have held peaceable and adverse possession of the lands described in the com-
103 plaint under title thereto for more than three years next before the commencement of this action.

II. For another defense defendants allege that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the

provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona; and of this they are ready to verify, and pray judgment of the court that they go hence with their costs in this behalf expended.

For a fourth defense.

The defendants further say that plaintiff ought not to be allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, plaintiff's grantor, appointed administrator of the estate of J. M. Bryan, deceased, who is mentioned and referred to in the complaint, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited to the probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to
104 said estate and the property and affairs thereof; in which said final account said administrator reported to said court, among other things, that said tract of land in said complaint described had been sold to pay the mortgage thereon, which is referred to in the complaint; that the said Vina Bryan (wife and heir-at-law of said deceased) and plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time and place for the hearing, settlement, and approval thereof by said probate court, but that the said Vina Bryan then or thereafter made no objection to the said account or any part thereof nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said administrator and said decree and judgment of said probate court are hereby referred to and made part hereof.

For a fifth defense.

Defendants further allege that said Vina Bryan well knew of the sale of said northeast quarter of section 5, township one north, of range three east, of Gila and Salt river meridian, under and by virtue of the judgment set forth in the complaint in this action, and of the purchase thereof by Simms and of his entry into posses-
105 sion thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by the defendant Brasius, but she made no objection thereto or claimed any interest in said lands, but remained silent; that the defendant Brasius purchased lands, together with certain other lands, for the sum of fifty-nine thousand dollars from said J. T. Simms, which said Vina Bryan well knew, and she made no objection thereto nor made any claim to said lands; that this

defendant entered into the possession of said land under said sale, which said Vina Bryan well knew; that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced thereto; that said J. T. Simms made valuable improvements upon said lands to the amount of upwards of one thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced thereto.

For a sixth defense.

For a further defense defendants allege that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of J. M. Bryan, deceased, to M. W. Kales, who thereupon qualified and entered upon the duties of such administrator; that within the time prescribed by law creditors of the said J. M. Bryan presented their claims
106 according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed and allowed by the probate court as claims against the estate of J. M. Bryan and entitled to payment out of the proceeds of said estate amounted to the sum of forty-two thousand and two hundred and thirty-six $\frac{93}{100}$ dollars; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from said estate were insufficient to pay the general creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made a decree and order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was done, leaving said creditors unpaid in the sum of eleven thousand and seven hundred and eighty $\frac{45}{100}$ dollars, which said indebtedness of said J. M. Bryan still remains unpaid.

Seventh defense.

For a further answer defendants deny that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before any or either of
107 the notes set forth in plaintiff's complaint was due or payable, or before they or either one of them had been presented to the probate judge or probate court of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest on any of them or to sell any lands or personal property or any lands which have been mortgaged to secure the payment of said notes or either of them.

Deny that said suit was commenced while said administrator had in his hands sufficient or any funds whatever of said estate to pay

all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Deny that the amount bid by the said M. W. Kales at the sheriff's sale referred to — plaintiff's complaint for said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or otherwise or less than said land would have brought in open market or otherwise or less than said land would have brought at a regular or usual sheriff's sale, but aver that the same was a full and reasonable price for said land and all the same was worth.

Deny that the lands mentioned in plaintiff's complaint,
108 to wit, the northeast quarter of section five, township one north, of range three east, of Gila and Salt river meridian, or any part thereof after the death of said J. M. Bryan — the title thereto or any part thereof vested in Vina Bryan, but aver that the same was subject to the said mortgage set forth in plaintiff's complaint, and the same was sold to pay said mortgage, and all and every right, title, or interest said J. M. Bryan or his estate had therein was divested and alienated, and neither said estate nor the heirs of said Bryan have had any right, title, or interest in said property since the 5th day of November, 1884, and denies that plaintiff is the owner in fee or otherwise of the said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian or any part thereof, and alleges that the said M. W. Kales purchased said land at sheriff's sale under the judgment set forth in plaintiff's complaint on the 15th day of December, 1883, for the sum of two thousand nine hundred and seventy-five dollars, which was a fair, reasonable, and just price for said land and all the same was then worth; that thereafter said M. W. Kales duly sold and assigned said certificate of sale received by him from said sheriff to the defendant, J. T. Simms, for the sum of over three thousand dollars, which said Simms paid to said Kales therefor, of all which said Vina Bryan had notice and well knew and made no objection thereto, but acquiesced therein; that
109 thereafter said sheriff duly made and executed his deed, whereby he conveyed said land known as the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, unto said J. T. Simms, who thereby became and was, on the 16th day of June, A. D. 1884, the owner thereof, and entered into possession and commenced to improve said tract of land, and continued in the possession and occupancy and continued to improve said land from thence until some time on or about the 28th day of February, A. D. 1887, when, said land, by reason of the improvements made upon it by said Simms, having increased in value, the said Simms and his wife, Hannah T. Simms, granted, bargained, sold, and conveyed said tract of land, together with certain other tracts, to this defendant for the sum of fifty-nine thousand dollars, and this defendant thereupon entered into possession of said land as the owner thereof and caused the same to be surveyed and subdivided into blocks, lots, streets, and alleys as and

for town lots, and publicly advertised the same for sale and sold to divers and sundry persons nearly all the lots in said tract of land before the commencement of this action, and among the persons who purchased lots in said tract were one Myra K. Olds and one George Tantau; that thereafter and on or about the 8th day of June,
A. D. 1887, said Vina Bryan, plaintiff's grantor, now known
110 as Vina Brown, purchased said lot or lots which had previously been sold by this defendant to said George Tantau; and defendants are informed and believe and so aver that said Vina Brown, plaintiff's grantor, did pay for said lots so sold by the defendant to said Myra K. Olds and George Tantau the sum of eighteen hundred dollars in lawful money of the United States; that said Vina Brown, plaintiff's grantor, well knew and had notice of said sale of said premises by said Simms and wife to the defendant, and the entry of this defendant into possession thereof, and of the surveying of said tract of land and the subdividing thereof into blocks, lots, streets, and alleys, and of the advertising and offering of said lots for sale, and the selling of said lots composing said tract of land, and made no objection thereto, but acquiesced therein; deny that Vina Bryan did not consent to or affirm the sales, deeds, certificates of sale, conveyances, or proceedings made by the defendants or any of them — of the said district or probate court or said sheriff; but, on the contrary, said defendants allege that said Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgments set forth in said complaint, the sale of the land
therein alleged, and the execution of the deeds therein set
111 forth; deny that said Vina Bryan did ever affirm that the sales, deeds, certificates of sales, conveyances, or proceedings by the said defendants or by the said probate or district court or sheriff or either of them were or was unwarranted, against equity, or without authority of law.

Deny that these defendants had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgage mentioned in said complaint, the judgment of foreclosure of said mortgage, the sale of said lands described in paragraph five of this answer, the issuance of the sheriff's certificate of sale thereunder, and of the execution of the deed therefor at any time before the commencement of this suit.

Eighth defense.

And for a further and separate defense these defendants allege that heretofore, to wit, on or about the 13th day of June, A. D. 1884, one M. W. Kales was or pretended to be the owner of the certificate of sale issued by L. H. Orme, as sheriff of Maricopa county, of the tract of land described in the plaintiff's complaint as follows, to wit, the northeast quarter of section five, in township one north, range three east, of Gila and Salt river meridian, free from all incumbrances, and he was then in the actual possession thereof; that the

defendant, J. T. Simms, believing such to be the fact, on that
112 day agreed with him for the purchase thereof for the price of three thousand five hundred dollars; whereupon said M. W. Kales conveyed and assigned the said certificate of sale to the said J. T. Simms by his deed and instrument in writing dated on the 13th day of June, A. D. 1884; that the sum of three thousand five hundred dollars was actually paid by said Simms to said Kales at the time of the date of said assignment; that afterwards, to wit, on or about the 16th day of June, 1884, L. H. Orme, as sheriff of Maricopa county, pursuant to said certificate of sale and for and in consideration of the money bid by said Kales and paid by said Simms, did make, execute, and deliver unto said Simms his deed, whereby he did convey unto said Simms all the right, title, and interest of said J. M. Bryan at the said date of the execution of said mortgage, to wit, the 23d day of February, 1883, or which he or his estate acquired thereafter of, in, or to said premises or any part thereof; that said Simms thereupon entered into, occupied, and — possession of the said premises and improved the same, and expended large sums of money in improving said lands and premises, and continued in the actual possession thereof until on or about the 28th day of February, A. D. 1887; that said Simms had not, at or before the time of the said conveyance and assignment to him by said Kales and the execution of said deed to him by said sheriff or of the payment of the purchase-money, any notice whatever, either expressed or implied, that the plaintiff in the said suit or ac-
113 tion referred to in the complaint which was brought to foreclose said mortgage was the same identical person who was named as the defendant in said suit or action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said property, was the same identical person who was the administrator of the estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action.

Wherefore defendants pray judgment that they go hence without delay, and for their costs herein.

CLARK CHURCHILL,
Att'y for Def'ts.

COUNTY OF MARICOPA, }
Territory of Arizona, } ss:

Henry W. Ryder, being first duly sworn, deposes and says he is one of the defendants in the above-entitled cause; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except as to the matters and things therein stated upon information and belief, and as to those matters he believes it to be true.

HENRY RYDER.

Subscribed and sworn to before me this 22nd day of October, A. D. 1887.

[SEAL.]

J. E. WALKER,
Clerk Dist. Court.

Endorsed: Filed Oct. 22nd, 1887. J. E. Walker, clerk.

114 Title of court and cause.

Answer of George T. Brasius.

Now comes the above-named defendant, George T. Brasius, and, answering the complaint of the above-named plaintiff, alleges—

For a first defense.

That when this action was commenced there was another action brought and then pending in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa by the said plaintiff, T. J. Bryan, and against this defendant for the same supposed cause of action and for the recovery of the same property described in the plaintiff's complaint herein as the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, which said action is still pending; and of this he is ready to verify. Whereupon he prays judgment that he go hence with his costs in this behalf expended.

For a second defense.

The defendant excepts to the plaintiff's complaint and says the same is insufficient in law to require him to answer thereto; and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

For a third defense.

115 Defendant alleges that the pretended interest and title through and by which plaintiff claims the lands described in the complaint and hereinabove described was acquired by said plaintiff while this defendant was in the peaceable and adverse possession of said lands, of which said lands or any part thereof plaintiff has never been in possession; and of this he prays judgment of the court that he go hence with his costs in this behalf expended.

For a fourth defense.

I. Defendant alleges that plaintiff ought not to have or maintain this action, because the defendant and his grantors has had and has held peaceable and adverse possession of the lands described in the complaint and hereinabove described under title thereto for more than three years next before the commencement of this action.

II. For another defense defendant alleges that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause of action is barred by the provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona; and of this he is ready to verify, and prays

judgment of the court that he go hence with his costs in this behalf expended.

For a fifth defense.

The defendant further says that plaintiff ought not to be
116 allowed to maintain this action, because M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, plaintiff's grantor, appointed administrator of the estate of J. M. Bryan, deceased, who is mentioned and referred to in the complaint, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited to the said probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to said estate and the property and affairs thereof; in which final account said administrator reported to said court, among other things, that said tract of land in said complaint and in paragraph "one" of this answer described had been sold to pay the mortgage thereon, which is referred to in the complaint; that the said Vina Bryan (wife and heir-at-law of said deceased) and plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time and place for the hearing, settlement, and approval thereof by said probate court, but that
117 the said Vina Bryan then or thereafter made no objection to the said account or any part thereof nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said administrator and said decree and judgment of said probate court are hereby referred to and made part hereof.

For a sixth defense.

Defendant further alleges that said Vina Bryan well knew of the sale of said northeast quarter of section five, township one north, of range three east, of Gila and Salt river meridian, under and by virtue of the judgment set forth in the complaint in this action, and of the purchase thereof by said J. T. Simms, and of his entry into possession thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by this defendant, but she made no objection thereto or claimed any interest in said lands, but remained silent; that this defendant purchased said lands, together with certain other lands, for the sum of fifty-nine thousand dollars from said J. T. Simms, which said Vina Bryan well knew, and she made no objection thereto

nor made any claim to said land; that this defendant entered
118 into the possession of said land under said sale, which said Vina Bryan well knew; that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced thereto; that said J. T. Simms made valuable improvements upon said lands to the amount of upwards of one thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced thereto.

For a seventh defense.

For a further defense defendant alleges that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of said J. M. Bryan, deceased, to M. W. Kales, who thereupon qualified and entered upon the duties of such administrator; that within the time prescribed by law creditors of the said J. M. Bryan presented their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claim allowed by the said administrator and filed and allowed by the probate court as claim against the estate of said J. M. Bryan and entitled to payment out of the proceeds of said estate amounting to the sum of forty-two thousand two hundred and thirty-six $\frac{93}{100}$ dollars;
119 that upon the presentation of the account of said administrator to the said probate court, it appearing that the proceeds derived from the said estate were insufficient to pay the creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claim, to wit: forty-six (46 %) per cent. thereof, that the said probate court duly made a decree and order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was done, leaving said creditors unpaid in the sum of eleven thousand and seven hundred and eighty $\frac{45}{100}$ dollars, which indebtedness of said J. M. Bryan still remains unpaid

Eighth defense.

For a further answer defendant denies that the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before *or* any or either of the notes set forth in plaintiff's complaint was due or payable, or before they or either of them had been presented to the probate judge or probate court of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or the principal or interest on any of them or to sell any lands or personal property or
120 any lands which had been mortgaged to secure the payment of said notes or either of them.

Denies that said suit was commenced while said administrator

had in his hands sufficient or any funds whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Denies that the amount bid by the said M. W. Kales at the sheriff's sale referred to in plaintiff's complaint for said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, was an inferior price therefor or less than the said land was worth in open market or less than it would have brought at a regular or usual sheriff's sale or otherwise, but avers that the same was a full and reasonable price for the said land and all the same was worth.

Denies that the lands mentioned in plaintiff's complaint, to wit, the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, or any part thereof after the death of said J. M. Bryan — the title thereto or any part thereof vested in Vina Bryan, but avers that the same was subject to the said mortgage set forth in plaintiff's complaint, and the same was sold to pay said mortgage, and all and every right, title, or interest said J. M. Bryan or his estate had therein
120½ was divested and alienated, and neither said estate nor the heirs of said Bryan have had any right, title, or interest in said property since the 5th day of November, 1884, and denies that plaintiff is the owner in fee or otherwise of the said northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, or any part thereof, and alleges that the said M. W. Kales purchased said land under the judgment set forth in plaintiff's complaint on the 15th day of December, 1883, for the sum of two thousand and nine hundred dollars, which was a fair, reasonable, and just price for said land and all the same was then worth; that thereafter said M. W. Kales duly sold and assigned said certificate of sale received by him from said sheriff to the defendant, J. T. Simms, for the sum of over three thousand dollars, which said Simms paid to said Kales therefor, all of which said Vina Bryan had notice and well knew and made no objection thereto, but acquiesced therein; that thereafter said sheriff duly made and executed his deed, whereby he conveyed said land known as the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, unto said J. T. Simms, who thereby became and was, on the 16th day of June, A. D. 1884, the owner thereof, and entered into possession and commenced to improve said tract of land, and continued in the
121 possession and occupancy thereof, and continued to improve said lands from thence until some time on or about the 28th day of February, A. D. 1887, when, said land, by reason of the improvement made upon it by said Simms, having increased in value, the said Simms and his wife, Hannah T. Simms, granted, bargained, sold, and conveyed said tract of land, together with certain other lands, for the sum of fifty-nine thousand dollars, and this defendant thereupon entered into possession of said land as the owner thereof, and caused the same to be surveyed and subdivided into blocks, lots, streets, and alleys as and for town lots, and publicly advertised

the same for sale, and sold divers and sundry persons nearly all the lots in said tract of land before the commencement of this action, and among the persons who purchased lots in said tract were one Myra K. Olds and one George Tantau; that thereafter and on or about the 8th day of June, A. D. 1887, said Vina Bryan, plaintiff's grantor, now known as Vina Brown, purchased said lot or lots which had been previously sold by this defendant unto said Myra K. Olds from the said Myra K. Olds, and thereafter and on or about the 13th day of June, A. D. 1887, the said Vina Brown, plaintiff's grantor, purchased said lot or lots which had previously been sold by this defendant to said George Tantau; and this defendant is informed and believes and so avers that said Vina Brown, plaintiff's grantor, did pay for said lots so sold by this defendant to said
122 Myra K. Olds and George Tantau the sum of eighteen hundred dollars in lawful money of the United States; that said Vina Brown, plaintiff's grantor, well knew and had notice of said sale of said premises by said Simms and wife to this defendant, and the entry of this defendant into possession thereof, and of the surveying of said tract of land and the subdividing thereof into blocks, lots, streets, and alleys, and of the selling of said lots composing said tract of land, and made no objection thereto, but acquiesced therein.

Denies that Vina Bryan did not consent to or affirm the sales, deeds, certificates of sales, conveyances, or proceedings made by the defendants — or any of them, of the said district court or probate court or said sheriff; but, upon the contrary, said defendant alleges that said Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgments set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Denies that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, or proceedings by the said defendants or by the said probate or district court or sheriff were
123 unwarranted, against equity, or without authority of law, or that the same are or were unwarranted, against equity, or without authority of law.

Denies that this defendant had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes and mortgages mentioned in said complaint, the judgment of foreclosure of said mortgages, the sale of said lands described in paragraph one of this answer, the issuance of the sheriff's certificate of sale thereunder, and of the execution of the deed therefor.

Ninth defense.

And for a further and separate defense this defendant alleges that heretofore, to wit, on or about the 13th day of June, A. D. 1884, one M. W. Kales was or pretented to be the owner of the certificate of sale

issued by L. H. Orme, as sheriff of Maricopa county, of the tract of land described in the plaintiff's complaint as follows, to wit, the northeast quarter of section five, in township one north, of range three east, of Gila and Salt river meridian, free from all incumbrances, and he then was in the actual possession thereof; that the defendant, J. T. Simms, believing such to be the fact, on that day agreed with him for the purchase thereof for the price of three thousand five hundred dollars; whereupon said M. W. Kales conveyed and assigned the said certificate to the said J. T. Simms by his deed and instrument in writing dated on the 13th day of June, A. D. 1887; that the
124 sum of three thousand five hundred dollars was actually paid by said Simms to said Kales at the time of the date of said assignment; that thereafter, to wit, on or about the 16th day of June, A. D. 1884, L. H. Orme, as sheriff of Maricopa county, pursuant to said certificate of sale and for and in consideration of the money bid by said Kales and paid by said Simms, did make, execute, and deliver to said Simms his deed, whereby he did convey unto said Simms all the right, title, and interest of said J. M. Bryan at the said date of the execution of said mortgage, to wit, the 23rd day of February, 1883, or which he or his estate acquired thereafter of, in, or to said premises or any part thereof; that said Simms thereupon entered into possession and occupation of said premises and improved the same and expended large sums of money in improving said land — premises, and continued in actual possession thereof until on or about the 28th day of February, A. D. 1887; that said Simms had not, at or before the time of said conveyance and assignment to him by said Kales and the execution of said deed to him by said sheriff or of the payment of the purchase-money, any notice whatever, either express or implied, that the plaintiff in the said suit or action referred to in the complaint which was brought to foreclose said mortgage was the same identical person who was named as the defendant in said suit or action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said property, was the same identical person who was the administrator of the
125 estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action; and this defendant avers that thereafter, to wit, on the 28th day of February, A. D. 1887, J. T. Simms with his wife, Hannah T. Simms, were or pretended to be the owners in fee simple of the said northeast quarter of section five, township one north, of range three east of Gila, and Salt river meridian, free from all incumbrances, and he then was in the actual possession thereof; that this defendant, believing such to be the fact, on that day agreed with him for the purchase thereof, together with certain other lands in fee simple, for the price of fifty-nine thousand dollars; whereupon the said J. T. Simms and his wife, Hannah T. Simms, conveyed the said premises to this defendant by their deed dated on the 28th day of February, A. D. 1887; that the sum of fifty-nine thousand dollars was actually paid by this defendant to said J. T. Simms at the time of the date of said deed; that this defendant had not, at or before the time of said conveyance or of the said payment of the purchase-money, any notice whatever, either

express or implied, that the plaintiff in the said suit or action referred to in the complaint which was brought to foreclose said mortgage was the same identical person who was named as the defendant in said suit or action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said property, was the same identical per-
126 son who was the administrator of the estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action.

And by way of cross-complaint and counter-claim by this defendant against said plaintiff this defendant alleges that heretofore, to wit, on the 28th day of February, A. D. 1887, this defendant became the owner of the premises described in plaintiff's complaint as the northeast quarter of section five, in township one north of Gila and Salt river meridian, and entered into possession thereof and subdivided the same into blocks, lots, streets, and alleys, and since then defendant has sold most of said lots composing said tract to divers and sundry persons; that this defendant is still in possession of the most of said tract of land, and he is obliged by covenants with the purchasers of said lots to defend their title thereto; that said plaintiff asserts and claims title to said tract of land adverse to this defendant and the several purchasers of said lots; that said claim of plaintiff is a cloud upon the title of this defendant and of the several purchasers of lots of this defendant.

Wherefore this defendant prays judgment that said plaintiff has no right, title, or interest or estate of, in, or to said premises or any part thereof; that this defendant and those who hold under him or the owners of said tract of land in fee simple *and* entitled to
127 the possession and enjoyment thereof; that said plaintiff be enjoined from asserting any right, title, claim, estate, or interest of, in, or to said premises or any part thereof adverse to this defendant or those who hold under him, and that this defendant do have and recover his costs and disbursements herein.

CLARK CHURCHILL,
Att'y for said Def't.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

William Christy, being duly sworn, says that he is the agent of George T. Brasius, the defendant in the above-entitled action, who is not within the Territory of Arizona; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM CHRISTY.

Subscribed and sworn to before me this 28th day of September, A. D. 1887.

[SEAL.]

W. D. FULWILER,
Notary Public.

Endorsed: Filed Sept. 28th, 1887. J. E. Walker, clerk.

127½ Title of court and cause.

Original Answer of Defendants, D. H. Pinney, The Bank of Napa, a Corporation; F. Q. Story, and M. H. Sherman.

Now comes the above-named defendants, D. H. Pinney, The Bank of Napa, a corporation; F. Q. Story, and M. H. Sherman, and, for themselves alone, make answer to plaintiff's complaint as follows:

I.

Defendants aver that this plaintiff should not be allowed to maintain this action without joining with him as plaintiffs one Cameron King and one E. J. Edwards, because prior to the commencement of this action, to wit, on the fourth day of July, 1887, said T. J. Bryan (the plaintiff herein) sold and conveyed by quitclaim deed to Cameron King and said E. J. Edwards an undivided one-half of his pretended interest and alleged title in and to block 98 of the city of Phœnix, part of the lands described in plaintiff's complaint, and of which these defendants are the owners.

II.

For another defense defendants allege that when this action was commenced there was another action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa by the said T. J. Bryan for the same
128 supposed cause of action and for the recovery of said block 98 of the city of Phœnix, which said action is now pending.

III.

For another defense defendants except to plaintiff's complaint and say the same is insufficient in law to require them to answer thereto; and of this they pray judgment of the court.

IV.

For another defense defendants allege that plaintiff ought not to have and maintain this action, because (1) defendants have had and held peaceable and adverse possession under title of the said block 98 of the city of Phœnix for more than three years before the commencement of this action. (2.) For another defense defendants allege that the pretended cause of action in said complaint set forth did not accrue at any time within three years next before the commencement of this action, and that the said pretended cause af action is barred by the provisions of sub. 4, sec. 14, act No. 100, of the 11th Legislative Assembly of Arizona.

V.

For another defense defendants allege that the pretended interest and title through and by which plaintiff claims the said block 98 was acquired by said plaintiff while defendants were in the peace-

able and adverse possession of said lands, and of which said
129 land or any part thereof plaintiff has never been in possession.

VI.

Defendants further say that plaintiff ought not to be allowed to maintain this action, because one M. W. Kales was heretofore, in the month of September, 1883, at the request of Vina Bryan, appointed administrator of the estate of J. M. Bryan, deceased, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time said administrator, M. W. Kales, exhibited to the said probate court (which court had sole jurisdiction in the premises) a full, true, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by said administrator in relation to said block 98; that the said Vina Bryan (wife and heir-at-law of said deceased) had full and legal notice of the presentation and filing of said account and of the time and place fixed for the hearing, settlement, and approval thereof; that the said Vina Bryan then or thereafter made no objection to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by said probate court.

VII.

130 Defendants further allege that the said Vina Bryan well knew of the sale of said block 98 under and by virtue of the judgment set forth in the complaint in this action, and of the purchase of said land by said D. H. Pinney, and of his entry into possession of the same, and of his making large and valuable improvements thereon, to the amount of $5,000.00, and of the sale of portions thereof to the Bank of Napa, F. Q. Story, and Moses Sherman, to none of which she at any time made any objection or asserted any interest in or to said land, but she remained silent and acquiesced in the same for more than three years.

VIII.

For a further defense defendants allege that upon the 24th day of September, 1883, at the request of Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of J. M. Bryan, deceased, to one M. W. Kales, who thereupon qualified and entered upon the duties of such administrator; that — within the time prescribed by law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administrator and filed and allowed by the probate court as claims against the estate of said J. M. Bryan, deceased, and entitled to payment out of the proceeds of said estate
131 amounted to the sum of $22,027.16; that upon the presentation of the accounts of said administrator to the said probate

court, it appearing that the proceeds derived from said estate *was* insufficient to pay the creditors of said estate in full, and that said proceeds *was* only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made an order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was so done, leaving said creditors unpaid in the sum of $11,880.45, which said indebtedness of said J. M. Bryan, deceased, still remained unpaid.

IX.

For a further answer defendants deny that the suit of one M. W. Kales *vs.* one M. W. Kales, administrator of the estate of J. M. Bryan, deceased, register number 326, was commenced before any or either of the notes set forth in plaintiff's complaint was due or payable, or before they or one of them had been presented to the probate judge or probate court of Maricopa county, or before they or any of them had been allowed or rejected or in any way acted upon by said probate judge or court, or before applying to the said probate court for an order to pay said notes or either of them or to sell any lands or personal property or any lands which had been mortgaged to secure the payment of said notes or either of them.

132 Deny that said suit was commenced while said administrator had in his hands sufficient or any money whatever of said estate to pay all the principal or any part thereof or all the interest or any part thereof of said promissory notes or either of them.

Deny that the amount bid or paid by the said M. W. Kales at the sheriff's sale referred to in plaintiff's complaint for said block 98 was an inferior price therefor or less than said land was worth in open market or otherwise, but that the sum was a full, fair, and reasonable price for said land.

Deny that the land mentioned in plaintiff's complaint, to wit, said block 98, or any part thereof after the death of said J. M. Bryan descended to Vina Bryan, or that after the death of said J. M. Bryan the title thereto rested solely in Vina Bryan otherwise than subject to the debts of said J. M. Bryan, deceased, and the said mortgages set forth in plaintiff's complaint; and defendants deny that any title to said land rested in or remained in said Vina Bryan longer than or after June 16th, 1884.

Deny that plaintiff is the owner in fee or otherwise of said block 98 or any part thereof, and allege that M. W. Kales purchased said land at sheriff's sale under the judgment set forth in plaintiff's complaint on the 15th day of December, 1883, for the sum of $600, which was a fair, reasonable, and just price for said

133 land; that thereafter the said M. W. Kales transferred his interest in said land to said defendant, D. H. Pinney, who is now the owner of said block 98 excepted those portions thereof sold by him to the Bank of Napa, F. Q. Story, and M. H. Sherman.

Deny that the said Vina Bryan did not consent to or affirm the sales, deeds, certificates of sales, conveyances, or proceedings made by the defendants or any of them — of the said district court or pro-

bate court or said sheriff; but, upon the contrary, said defendants allege that Vina Bryan consented to, ratified, and acquiesced in all the proceedings had and done either in the said probate court or the district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of said estate of J. M. Bryan, deceased, the recovery of the judgment set forth in said complaint, the sale of the land therein alleged, and the execution of the deeds therein set forth.

Deny that said Vina Bryan did ever affirm that the sales, deeds, certificates of sale, conveyances, and proceedings by the said defendants or by the said probate or district court or sheriff were unwarranted, against equity, or without authority of law, or that the same were or are unwarranted, against equity, or without authority of law.

Deny that these defendants had any notice of the facts alleged in plaintiff's complaint other than the execution of the notes
134 and mortgages mentioned in said complaint, the judgment of foreclosure of said mortgages, the sale of said land described as block 98, the issuance of the sheriff's certificate therefor, and the execution of the deed to this defendant, D. H. Pinney.

Defendants further allege that said M. W. Kales and D. H. Pinney, the Bank of Napa, F. Q. Story, and M. H. Sherman purchased said block 98 in good faith, for a valuable consideration, and without any notice of any defect in the title of said land, if any there be.

Having fully answered, defendants pray that plaintiff take nothing by this action, and that defendants have judgment for their costs.

D. H. PINNEY,
Attorney for Defendants.

BAKER & CAMPBELL, *Of Counsel.*

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

W. L. Pinney, being duly sworn, says that he is the agent of D. H. Pinney, one of the defendants in the above-entitled action, who is not now within the Territory of Arizona; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. L. PINNEY.

135 Subscribed and sworn to before me this 24th day of September, A. D. 1887.

[SEAL.]

J. E. WALKER,
Clerk of Dist. Court.

Endorsed: Filed Sept. 24th, 1887. J. E. Walker, clerk.

Title of court and cause.

Minutes of Trial.

NOVEMBER 11TH, 1887.

The demurrer in this cause came on regularly to be heard, was argued to the court by counsel, submitted, and by the court taken under advisement.

W. W. PORTER, *Judge.*

Title of court and cause.

Minute Order Sustaining Demurrer.

DECEMBER 27TH, 1887.

The demurrer — heretofore argued, submitted, and by the court taken under advisement, now, on this day, after due deliberation thereon, it is ordered that the demurrer be sustained.

Plaintiff, by his counsel, duly excepted.

Leave granted to answer for one day.

WM. W. PORTER, *Judge.*

136 Title of court and cause.

Minute Order and Notice of Appeal to Supreme Court.

DECEMBER 30TH, 1887.

Plaintiff refused to amend his complaint. The court rendered judgment that this cause be dismissed and the defendants recover their costs herein.

Plaintiff this day filed his motion for a new trial.

The motion is overruled and new trial denied, to which plaintiff excepts.

Plaintiff in open court gave notice of appeal from the judgment and from the order denying a new trial to the supreme court of Arizona Territory.

WM. W. PORTER, *Judge.*

137 *Judgment.*

The above-entitled cause having come regularly on to be heard before the court upon the demurrer of the defendants to the complaint on the 11th day of November, A. D. 1887, the same was argued by counsel for the plaintiff and also argued by counsel for the defendants and finally submitted to the court for decision and taken under advisement by the court; and thereafter, on the 27th day of December, A. D. 1887, the court, being fully advised in the premises and having fully considered the case, rendered its decision in the premises and made an order sustaining said demurrer to said complaint and gave the plaintiff leave to amend said complaint within

one day thereafter; and thereafter, to wit, on the 29th day of December, A. D. 1887, the plaintiff having failed and refused to amend his said complaint, the court rendered final judgment in the case, adjudging that the said action be dismissed, and that the defendants recover their costs herein.

Now, therefore, on motion of counsel for defendants, it is ordered, adjudged, and decreed that the said suit and action be, and the same is hereby, dismissed, and that the said defendants do have and recover of and from the said plaintiff their costs herein, amounting to fifty-eight and seventy-five hundredths dollars.

Done in open court this 29th day of December, A. D. 1887.

138 WM. W. PORTER, *Judge.*

Endorsed: Filed Jan. 10th, 1888. J. E. Walker, clerk.

Title of court and cause.

Bill of Exceptions Settled and Allowed by the Court.

Be it remembered that on this 27th day of December, 1887, the court made an order sustaining defendants' demurrer to plaintiff's complaint in the above-entitled action upon the ground that it appeared from the complaint that plaintiff had been guilty of laches and too great delay in bringing the said action, and that the complaint did not allege any reason for his delay in commencing said action.

To which ruling and order of the court plaintiff then and there excepted and still excepts, and presents this his bill of exceptions and asks that the same be allowed.

Allowed.

WM. W. PORTER, *Dist. Judge.*

Endorsed: Filed Dec. 29th, 1887. J. E. Walker, clerk.

139 Title of court and cause.

Motion for a New Trial.

Now comes the plaintiff and moves and prays the court to vacate and set aside the judgment rendered in this action and grant him a new trial on the following grounds:

1st. The court erred in sustaining defendants' demurrer to plaintiff's complaint.

2nd. The court erred in dismissing plaintiff's complaint and rendered judgment for defendants.

3rd. The judgment of the court is contrary to law.

4th. For other cause apparent on the record.

CAMERON H. KING,
GOODRICH, SMITH, STREET & GOODRICH,
Attorneys for Plaintiff.

Endorsed: Filed Dec. 29th, 1887. J. E. Walker, clerk.

Title of court and cause.

Appeal Bond.

Whereas in the above numbered and entitled cause, pending in the district court of the 2nd judicial district of Arizona in and for Maricopa county, had at a regular term of said court, to wit,
140 on the 29th day of December, 1887, the said defendants, M. W. Kales, L. H. Orme, Robert Garside, William Gilson, Lizzie Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa (a corporation), F. Q. Story, and M. H. Sherman, recovered judgment against Thomas J. Bryan for the sum of fifty-eight and $\frac{75}{100}$ dollars, costs and disbursements in said action, from which judgment and the order of the court denying said plaintiff's motion for a new trial the said Thomas J. Bryan has taken an appeal to the supreme court of Arizona Territory and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, Thomas J. Bryan, as principal, and C. H. Gray and John J. Gardiner, as sureties, acknowledge ourselves bound to pay to the above-named defendants the sum of three hundred dollars, conditioned that the said Thomas J. Bryan shall prosecute his appeal with effect, and in case the judgment of the said supreme court shall be against him that he shall perform its judgment, sentence, or decree and pay all such damages as said court may award against him upon said appeal.

T. J. BRYAN. [SEAL.]
C. H. GRAY. [SEAL.]
J. J. GARDINER. [SEAL.]

141 TERRITORY OF ARIZONA, } *ss*:
County of Maricopa, }

C. H. Gray and J. J. Gardiner, being each duly sworn, each for himself says that I am worth the amount specified in the foregoing bond for which I have signed as surety over and above my just debts and liabilities, exclusive of property exempt from execution.

C. H. GRAY.
J. J. GARDINER.

Subscribed and sworn to before me this 14th day of January, 1888.
[SEAL.] WEBSTER STREET,
Notary Public.

Endorsed: Approved and filed Jan. 16th, 1888. J. E. Walker, clerk.

142 In the District Court, Second Judicial District of Arizona, in and for Maricopa County.

T. J. BRYAN
vs.
M. W. KALES *et al.* } No. 765.

Assignment of Error on Appeal.

The plaintiff assigns for error the following matters, which occurred on the trial of this cause in the court below:

1st. The court erred in sustaining defendants' demurrer to plaintiff's complaint and dismissing plaintiff's action.

2nd. The court erred in rendering judgment for defendants.

3rd. The court erred in overruling plaintiff's motion for new trial for the reasons therein stated.

4th. For other reasons apparent of record.

C. H. KING,
GOODRICH & STREET,
Att'ys for Plaintiff.

Endorsed: Filed March 14th, 1888. J. E. Walker, clerk.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa. }

I, J. E. Walker, clerk of the district court, second judicial
143 district, Territory of Arizona, in and for the county of Maricopa, do hereby certify the above and foregoing to be a full, true, and correct copy of the assignment of errors in case No. 765, entitled T. J. Bryan *vs.* M. W. Kales *et al.*

Witness my hand and the seal of said district court this 14th day of March, A. D. 1888.

[SEAL.] J. E. WALKER, *Clerk.*

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa, do hereby certify the above and foregoing to be a full, true, and correct copy of the complaint; answer of M. W. Kales, L. H. Orme, sheriff; Robert Garside, William Gilson, Lizzie Gilson, Cordelia Beckett, C. G. Beckett, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, John W. Jeffries, Henry W. Ryder, George T. Brasius, D. H. Pinney, the Bank of Napa, a corporation; F. Q. Story, and M. H. Sherman; minutes of the trial; minute order sustaining demurrer; judgment; bill of exceptions; motion for a new trial; minute order overruling motion for new trial, and notice of appeal to the supreme court of Arizona Territory, and appeal bond
144 in case No. 765, entitled Thomas J. Bryan, plaintiff, *vs.* M. W. Kales *et al.*

And do further certify that the costs that have accrued in the above cause amount to the sum of $58.50.

Witness my hand and seal of said district court this 14th day of March, A. D. 1888.

[SEAL.] J. E. WALKER, *Clerk.*

Endorsed: Filed March 16th, 1888. E. B. Dodge, clerk.

145 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff and App'l't,
vs.
M. W. KALES *et al.*, Def'ts & Appel's.

This cause having heretofore been argued, submitted, and by the court taken under advisement, and the court having fully considered the same and being fully advised in the premises, it is ordered that the judgment of the district court be, and the same is hereby, affirmed. Appellant then and there in open court gave notice of appeal to the Supreme Court of the United States, opposing counsel being present.

Opinion rendered by W. W. Porter, A. J.; Jas. Wright, C. J., and Wm. H. Barnes, associate justice, concurring.

In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES *et al.*, Def'ts & App'l'nts. } Adjourned Feb. Term, 1889.

Appeal from Maricopa county.

This cause — heretofore been argued and submitted, and the court having duly considered the same and being fully advised in the premises, it is by the court ordered, adjudged, and decreed that the judgment of the lower court appealed from be, and the same is hereby, affirmed. Judgment rendered entered this 13th day of Feb., 1889.

Attest: WILLIAM WILKINSON, *Clerk,*
By J. E. WALKER, *Deputy Clerk.*

Opinion by W. W. Porter, A. J. Jas. H. Wright, C. J., & Wm. H. Barnes, A. J., concurring.

146 In the Supreme Court of the Territory of Arizona.

THOMAS J. BRYAN, Plaintiff,
vs.
M. W. KALES *et als.*, Defendants. } Opinion by Porter, Justice.

The bill in this case sets forth that plaintiff is a resident of Maricopa county; that some of defendants reside in same county and others in places outside the Territory; that one Jonathan M. Bryan

on or about the 20th day of August, 1883, died intestate, and at his death was the owner, seized, and possessed of several tracts of land described in the bill, all situated in the county of Maricopa; that on or about the 24th day of September, 1883, letters of administration upon the estate of Jonathan M. Bryan, deceased, were issued by the probate court of Maricopa county to M. W. Kales, defendant herein; that during the lifetime of Bryan he executed to Kales certain promissory notes, for the security of the payment of which he also executed and delivered to Kales a mortgage on all the real estate described in the bill; that said Kales, without presentation for allowance of his debts in the probate court, commenced an action in the district court of the second judicial district for Maricopa county in his own proper person and name in his individual
147 capacity against himself in his representative capacity as administrator, and made answer to the complaint in such representative capacity.

Whereupon, on the 9th day of October, 1883, a judgment of foreclosure was made and entered, and on the 8th day of Nov., 1883, the district court made an order of sale of said premises; that in pursuance thereof sales were made of the different parcels of the land, the defendant, Robert Garside, being the purchaser of one piece, M. W. Kales of two other separate pieces, and defendant, William Gilson, of another portion; that after the sales and before the making of any deeds by the sheriff Kales sold one quarter section to J. T. Simms, and the certificate of purchase was set over to Simms.

That Kales, before the making of any deed, assigned to defendant, D. H. Pinney, block 98 of the city of Phœnix, it being a part purchased by Kales at sheriff's sale; that on June 16th, 1884, the sheriff executed and delivered to Garside a deed of the part he bought, and that Garside, on May 27th, 1887, sold the same to defendant, J. De Barth Shorb.

That on June 10th, 1884, the sheriff executed and delivered a deed to Simms, as assignee, of the certificate of purchase from Kales — the parcel of land so purchased by him.

That defendant Simms, on February 28th, 1887, sold the same to defendant, George T. Brasius, who subdivided the same into blocks and lots, with streets running through said property, which
148 is now known and designated as "Central Place;" that Brasius sold a lot therein to John W. Jeffries on May 3rd, 1887, and on May 5th, 1887, sold another lot to defendant, Henry W. Ryder.

That on June 19th, 1884, the sheriff executed a deed to defendant, William Gilson, for the part purchased by him, who, on April 6th, 1886, sold the same to defendant, Cordelia L. Beckett.

That on the 16th day of June, 1884, the sheriff executed a deed to D. H. Pinney, who, on the 10th day of September, 1886, sold a portion thereof to defendant, The Bank of Napa, California, and that said Pinney, on Nov. 18th, 1886, conveyed another part of said block to defendant, F. Q. Story, who thereafter sold the same to defendant, M. H. Sherman, who is now in possession of the same.

The bill further states that, at the time of the death of said Jona-

than M. Bryan, Vina Brown was the wife of Bryan, and did survive him without issue, and said Bryan left no descendants; that all of the property was community property, and that she thus acquired title to the property and so held the same until the 29th day of June, 1887, — she conveyed the same to plaintiff, Thomas J. Bryan, for a good and valuable consideration. The bill alleges that the price bid and paid for each respective piece of property was an inferior price and less than each was worth in open market.

149 That of all the facts so alleged the defendants and each of them had full notice; that the defendant, D. H. Pinney, was the judge of the district court and acted as such in all the proceedings had in said action, and was the judge of said court at the time of the assignment of the certificates of sale to him.

It is alleged that the premises are of the value of $125,000.

The prayer of the bill is that all the proceedings made by the district court in the action where M. W. Kales was plaintiff and M. W. Kales was administrator be annulled, and the sales and certificates of sale be declared void, and the different parcels of the property conveyed or attempted to be conveyed be decreed to have been received with notice and in trust for Vina Bryan and her grantee, this plaintiff; that it be decreed that each respective part be decreed to be held in trust for this plaintiff, and that each of the defendants claiming to own any portion of said land by each respectively do convey to the plaintiff; that they be enjoined from selling the same. The defendant demurred for several causes, among them that the bill is insufficient to require him to answer thereto.

The district court sustained the demurrer because of laches in not bringing this action sooner, allowing plaintiff to amend his bill so as to show that there were no laches, which plaintiff declined to do and appeal- to this court.

150 All of this property was sold at a judicial sale. The price paid in the aggregate, as shown by the bill, amounted in round numbers to five thousand dollars.

It is now alleged to be worth $125,000. It appears that the grantor of plaintiff stood by and saw all this property sold and had a right to redeem the same in six months after the sale; that her residence was Maricopa county at the death of her husband, and its continuance will be presumed to be there, the contrary not having been alleged; that there was no action brought to set aside the judgment; that from the 8th day of November, 1883, till the 9th day of June, 1887—nearly four years—she saw the property greatly enhancing in value, saw it sold time and time again, then sells it to plaintiff, who now comes into a court of equity and asks a cancellation of all those sales.

If the bill had shown, and which plaintiff was allowed to show, that any disability existed on the part of any one having an interest in the property at the time of sale, we would grant the prayer of the bill. No such dissability being shown, can we think of allowing the party who has so long slept upon her rights to divest the present owners of their valuable property?

It may be argued that these parties, buying property which had

been sold under a decree of court, should have looked into
151 the validity of the judgment; that they, seeing an action of M. W. Kales against M. W. Kales, as administrator, should have gone further and enquired if they were the same persons. Granting that, and upon which we express no opinion, equity requires that the action in equity should have been sooner commenced. It is true that in an action at law under the statute five years to commence an action is allowed.

In the case of Harwood *vs.* Railroad Company, 17 Wallace, page 78, "Harwood and others, representing that they were stockholders in the Cincinnati and Chicago railroad, filed, on the 25th of December, 1865, a bill in the district court against the Air-Line Railroad Company and others to vacate a decree rendered in the same court in the early part of the year 1860, in a suit by George Carlisle, as trustee of a second mortgage on the road for the benefit of a certain issue of bonds, against The Cincinnati and Chicago Railroad Company. The bill in the case at bar alleged fraud and collusion in that suit between Carlisle and his confederates and certain other persons, lessees of the road and in its possession, and who had agreed to pay the interest on the mortgages.

It is alleged that by the concurrence of these several parties the road had been allowed to lose credit, and that the payment of interest on its second-mortgage bonds was wilfully neglected in order that the property might be sold; that this arrangement had
152 been carried out, and that the road had been sold and purchased in by the conspirators for about $25,000, when it was really worth $2,000,000 above a first mortgage of the same sum to which it was subject, and that the stockholders in the original road were injured by this collusive and fraudulent sale."

Let us read a part of the opinion of the Supreme Court and see if it *do* not exactly fit the case before us. The court says: We are of the opinion also that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed.

Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is in general terms of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge nor give a satisfactory reason why it was not sooner obtained. For aught that appears they have slept upon their knowledge for several years. Without reference to any statute of limitations the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstance of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure under which new rights and interests must necessarily have arisen.

153 See also Diendorf *vs.* Howse, 9 Howard's Practice, 243; The Key City, 14 Wallace, 653.

If in any case "the principle that the delay which will defeat a recovery" will apply it is the one at bar, the presence of the grantor

of plaintiff, seeing improvements on the property, seeing it first gradually improving from year to year, and then daily enhancing in value, and when the "boom" was reaching its acme selling to the plaintiff, who seeks to acquire this property, which sold at public vendue for about $5,000 and now alleged to be worth $125,000. To recover in such a case would be manifestly unjust and should have no standing in a court of equity.

The judgment of the district court is affirmed.

WM. W. PORTER, *A. J.*
JAS. H. WRIGHT, *C. J.*
WM. H. BARNES, *A. J.*

Endorsed: Filed February 13th, 1889. Entered Book 2, pages 67 & 72. Wm. Wilkinson, clerk, by J. E. Walker, deputy.

154 (*Petition and Allowance of Appeal.*)

In the Supreme Court of the Territory of Arizona.

THOMAS J. BRYAN, Plaintiff and Appellant,
vs.
M. W. KALES, L. H. ORME, ROBERT GARSIDE, WILLIAM GILSON, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa (a Corporation), F. Q. Story, and M. H. Sherman, Defendants and Appellees.

The above-named plaintiff and appellant, conceiving himself aggrieved by the final judgment, order, and decree entered by the supreme court of the Territory of Arizona on the thirteenth day of February, A. D. 1889, in the above-entitled cause, in which the judgment of the district court of the 2nd judicial district of Arizona *in* sustain*ing* defendants' and appellees' demurrer to the complaint and dismiss*ing* plaintiff's and appellant's complaint on the ground of laches, doth hereby appeal therefrom to the Supreme Court of the United States, and prays that this his appeal may be allowed, and that a transcript of the record, proceedings, judgment, and decisions in the cause be duly authenticated and sent to the Supreme Court of the United States.

THOMAS J. BRYAN, *In Person.*

GOODRICH & STREET AND
CAMERON H. KING,
Att'ys for Pl'ff and Appellant.

155 And now, to wit, on the 11th day of March, A. D. 1889, the appeal prayed for in the foregoing petition is hereby allowed, with citation to issue, on filing bond in the penal sum of five hun-

dred dollars and approval thereof by the chief justice of Arizona or any associate justice.

[SEAL.] JAMES H. WRIGHT,
Chief Justice of the Supreme Court of Arizona.

Endorsed: Filed March 30th, 1889. J. E. Walker, clerk.

156 In the Supreme Court of the Territory of Arizona.

THOMAS J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES, L. H. ORME, ROBERT GARSIDE, William Gilson, Lizzie Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa (a Corporation), F. Q. Story, and M. H. Sherman, Defendants and Appellees.
} Affidavit of Value.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

Thomas J. Bryan, being duly sworn, says that he is the plaintiff and appellant in the above-entitled cause, over twenty-one years of age, and a resident of Phœnix, in Maricopa county, Arizona; that he is fully acquainted with the property in dispute in this case, as described in his complaint, and that the value thereof and the value of the matter in dispute in this said cause, exclusive of costs, exceeds the sum of five thousand dollars; that the complaint in this cause alleges that the premises therein described and which are the subject-matter of this action are worth the sum of one hundred and twenty-five thousand dollars, and this affiant says that the
157 value of said premises are fairly stated in said complaint.

That this *affiant* is made to show the Supreme Court of the United States that they have jurisdiction of said cause on appeal so far as the value of the matter in dispute is concerned.

THOMAS J. BRYAN.

Subscribed and sworn to before me this 6th day of March, 1889.

[SEAL.] WM. WILKINSON,
Clerk of the Supreme Court of Arizona,
By J. E. WALKER,
Deputy Clerk.

Endorsed: Filed March 30th, 1889. J. E. Walker, clerk.

158 Supreme Court of the United States.

THOMAS J. BRYAN, Plaintiff and Appellant,
vs.
M. W. KALES, L. H. ORME, ROBERT GARSIDE, William Gilson, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George Brasius, D. H. Pinney, The Bank of Napa (a Corporation), F. Q. Story, M. H. Sherman, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, Defendants and Appellees.
} Bond on Appeal.

Know all men by these presents that we, Benjamin A. Fickos and Columbus H. Gray, Thomas J. Bryan, are held and firmly bound unto M. W. Kales, L. H. Orme, Robert Garside, William Gilson, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jefferies, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinny, the Bank of Napa, a corporation; F. Q. Story, and M. H. Sherman, of Maricopa county, Arizona, in the sum of five hundred dollars, to be paid to them, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

159 Sealed with our seals and dated this 20th day of March, A. D. 1889.

Whereas the above-named Thomas J. Byran hath obtained, taken, and prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Arizona on the thirteenth day of February, 1889, in favor of defendants and appellees and against plaintiff and appellant:

Now, therefore, the condition of this obligation is such that if the above-named Thomas J. Bryan, the plaintiff and appellant, shall prosecute his appeal to effect and shall answer all costs and damages if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

THOMAS J. BRYAN. [SEAL.]
BENJAMIN A. FICKUS. [SEAL.]
COLUMBUS H. GRAY. [SEAL.]

Sealed and delivered in presence of—
BEN. GOODRICH.

UNITED STATES OF AMERICA, *Territory of Arizona*, } *ss:*

Benjamin A. Fickas and Columbus H. Gray, being duly sworn, depose and say and each for himself that he is worth the sum of

five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

BENJAMIN A. FICKAS.
COLUMBUS H. GRAY.

Subscribed and sworn to before me this 20th day of March, 1889.

[SEAL.] J. E. WALKER,
Clerk Sup. Court, Ter. of Arizona.

160 I hereby approve the above bond and the sufficientcy of the sureties thereto.

March the 20th, 1889.

JAMES H. WRIGHT,
[SEAL.] *Chief Justice of Sup. Court, Arizona Territory.*

Endorsed: Filed March 30th, 1889. J. E. Walker, clerk.

161 THE UNITED STATES OF AMERICA, *ss:*

To M. W. Kales, William Gilson, J. T. Simms, John W. Jeffries, C. G. Beckett, L. H. Orme, Lizzie Gilson, Hannah T. Simms, Henry W. Ryder, D. H. Pinney, Robert Garside, J. De Barth Shorb, George T. Brasius, Cordelia L. Beckett, F. Q. Story, the Bank of Napa, a corporation, and M. H. Sherman:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next (A. D. 1889), pursuant to and in answer to an appeal allowed by the chief justice of the Territory of Arizona from a judgment of the supreme court of Arizona entered therein on the 13th day of February, A. D. 1889, and which said appeal was allowed on the eleventh day of March, 1889, in which Thomas J. Bryan was there and is here plaintiff and appellant and you are defendants and appellees, to show cause, if any there be, why the judgment rendered against said Thomas J. Bryan, appellant, and in your favor should not be reversed, set aside, and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Wright, chief justice of the supreme court of the Territory of Arizona, this twentieth
162 (20th) day of March, A. D. 1889.

JAMES H. WRIGHT,
Chief Justice Sup. Court, Territory of Arizona.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

We, Baker and Campbell, attorneys for M. W. Kales, William Gilson, Lizzie Gilson, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa, a corporation; F. Q. Story, and M. H. Sherman, defendants mentioned in the above citation, hereby admit and accept service of the above citation and acknowledge receipt of cer-

tified copy of the same, at Phœnix, the 15th day of April, A. D. 1889.

BAKER AND CAMPBELL,
Attorneys for the Aforesaid Parties.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, Clark Churchill, attorney for Robert Garside, J. De Barth Shorb, J. T. Simms, Hannah Simms, Geo. T. Brasius, John W. Jeffries, H. W. Ryder, and M. W. Kales, defendants mentioned in the above citation, hereby admit and accept service of the above citation and acknowledgement receipt of certified copy of the same, at Phœnix, the 15th day of April, A. D. 1889.

CLARK CHURCHILL,
Attorney for Aforesaid Parties.

163 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, Frank Cox, attorney for L. H. Orme, one of the defendants in the foregoing citation, hereby admit and accept service of the above citation and acknowledge receipt of certified copy of the same, at Phœnix, the 18th day of April, A. D. 1889.

FRANK COX,
Att'y for L. H. Orme.

Endorsed: Filed April 5th, 1889. J. E. Walker, clerk.

164 In the Supreme Court of the Territory of Arizona.

THOMAS J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALE, L. H. ORME, ROBERT GARSIDE, WILLIAM GILSON, Lizzie E. Gilson, J. De Barth Shorb, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder, Cordelia L. Beckett, C. G. Beckett, D. H. Pinney, The Bank of Napa, a Corporation; F. Q. Story, and M. H. Sherman, Defendants and Appellees.

Statement of Facts.

This case was heard on appeal, the transcript of which showed that in the district court, from whose judgment the appeal was taken to the supreme court of the Territory, the cause was there heard upon the defendants' demurrers to the complaint, and that the demurrers were there sustained in the following judgment of the district court.

(Title of court and cause.)

Judgment.

The above-entitled cause having come on regularly to be heard

before the court upon the demurrer of the defendants to the complaint on the 11th day of November, A. D. 1887, the same was argued by counsel for the plaintiff and also argued by counsel for the defendants and finally submitted to the court for decision and taken
165 under advisement by the court; and thereafter, on the 27th day of December, A. D. 1887, the court, being fully advised in the premises and having fully considered the case, rendered its decision in the premises and made an order sustaining said demurrer to said complaint and gave the plaintiff leave to amend said complaint within one day thereafter; and thereafter, to wit, on the 29th day of December, A. D. 1887, the plaintiff having failed and refused to amend his said complaint, the court rendered final judgment in the case, adjudging that the said action be dismissed, and that the defendants recover their costs herein.

Now, therefore, on motion of counsel for defendants, it is ordered, adjudged, and decided that the said suit and action be, and the same is hereby, dismissed, and that the said defendants do have and recover of and from the said plaintiff their costs herein, amounting to fifty-eight and seventy-five hundredths dollars.

Done in open court this 29th day of December, A. D. 1887.

WM. W. PORTER, *Judge.*

The transcript further shows that the following bill of exceptions was settled and allowed by the district court:

(Title of court and cause.)

Be it remembered that on the 27th day of December, 1887, the court made an order sustaining the defendants' demurrer to plaintiff's complaint in the above-entitled action upon the ground that it appeared from the complaint that plaintiff had been guilty of laches and too great delay in bringing the said action, and that the complaint did not allege any reason for his de-
166 lay in commencing said action.

To which ruling and order of the court plaintiff then and there excepted and still excepts, and presents this his bill of exceptions and asks that the same be allowed.

Allowed.

WM. W. PORTER,
Dist. Judge.

The transcript further shows that the following assignments of error were made on appeal to the supreme court of the Territory:

1st. The court erred in sustaining defendants' demurrer to plaintiff's complaint and dismissing plaintiff's action.

2nd. The court erred in rendering judgment for defendants.

3rd. The court erred in overruling plaintiff's motion for a new trial for the reasons therein stated.

4th. For other reasons apparent on the record.

The appeal was regularly taken by the plaintiff to the supreme court of the Territory of Arizona, and there the judgment of the district court was affirmed in the following judgment, to wit:

(Title of the court and cause.)

Appeal from Maricopa County.

This cause having heretofore been argued and submitted, and the court having duly considered the same and being fully advised in the premises, it is by the court ordered, adjudged,
167 and decreed that the judgment of the lower court appealed from be, and the same is hereby, affirmed.

Judgment entered this 13th day of February, 1889.

Attest: WILLIAM WILKINSON, *Clerk*,
By J. E. WALKER, *Deputy Clerk.*

Opinion by Porter, A. J., James Wright, C. J., and Wm. H. Barnes, A. J., concurring.

The above statement is correct.

BAKER & CAMPBELL,
Attorneys for M. W. Kales, William and Lizzie Gilson, C. G. Beckett, D. H. Pinney, Bank of Napa, F. Q. Story, and M. H. Sherman.
CLARK CHURCHILL,
Att'y for J. De Barth Shorb, Robert Garside, J. T. Simms, Hannah T. Simms, George T. Brasius, John W. Jeffries, Henry W. Ryder.
GOODRICH AND STREET AND
CAMERON H. KING, *Att'ys for Plaintiff.*

(Title of court and cause.)

Assignment of Errors.

The court erred—

1st. In affirming the judgment of the district court.

2nd. In adjudging that plaintiff and appellant had been guilty of laches.

3rd. In sustaining defendants' and appellees' demurrer to plaintiff's complaint.

168 4th. In dismissing plaintiff's complaint and rendering judgment for defendants.

5th. The judgment of the court is contrary to law.

6th. For other causes apparent on the record.

7th. In not rendering judgment for plaintiff and appellant.

STREET & GOODRICH AND
C. H. KING,
Attorneys for Plaintiff & Appellant.

Wherefore plaintiff and appellant prays that the judgment of the supreme court of the Territory of Arizona be reversed, and that judgment on the pleadings be rendered for plaintiff and appellant.

GOODRICH & STREET AND
CAMERON H. KING,
Attorneys for Plaintiff and Appellant.

(Endorsed:) Filed May 13th, 1889. J. E. Walker, clerk.

169 SUPREME COURT, } ss:
Territory of Arizona, }

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing printed and written pages (numbered from 1 to 168, inclusive) are a full, true, and correct transcript of the record and proceedings in the cause, Thomas J. Bryan *vs.* M. W. Kales *et al.*, therein named, as the same appears of record and on file in my office.

Witness my hand and the seal of said court this 29 day of May, A. D. 1889.

[Seal United States Supreme Court, Arizona.]

J. E. WALKER, *Clerk.*

Endorsed on cover: Arizona T. supreme court. No. 1287. Thomas J. Bryan, appellant, *vs.* M. W. Kales, L. H. Orme, Robert Garside, *et al.* Filed October 4, 1889.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THOMAS J. BRYAN,
Appellant,

vs.

M. W. KALES, L. H. ORME (Sheriff), ROBERT GARSIDE, WILLIAM GILSON LIZZIE GILSON, J. DE BARTH SHORB, J. T. SIMMS, HANNAH T. SIMMS, ROBERT T. BRASSINS, JOHN W. JEFFRIES, HENRY W. RYDER, CORDELIA L. BECKETT, C. G. BECKETT, D. H. PINNEY, THE BANK OF NAPA, a Corporation, F. Q. STORY and M. H. SHERMAN, *Appellees.*

No. 1,287.

GOODRICH & STREET,
and WM. A. McKENNEY,
Attorneys for Appellant.

R. O. Polkinhorn, Printer.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THOMAS J. BRYAN,
Appellant,

vs.

M. W. KALES, L. H. ORME (Sheriff), ROBERT GARSIDE, WILLIAM GILSON LIZZIE GILSON, J. DE BARTH SHORB, J. T. SIMMS, HANNAH T. SIMMS, ROBERT T. BRASSINS, JOHN W. JEFFRIES, HENRY W. RYDER, CORDELIA L. BECKETT, C. G. BECKETT, D. H. PINNEY, THE BANK OF NAPA, a Corporation, F. Q. STORY and M. H. SHERMAN, *Appellees.*

No. 1,287.

Statement of the Case.

This is a suit in equity, brought by appellant, Bryan, in the District Court of Maricopa County, Arizona, on the 18th day of July, 1887, against the defendants to anull and set aside the proceedings, judgments, decree, and order of sale made by said court on the 16th day of October, 1883, in the suit of M. W. Kales against M. W. Kales, administrator of the

estate of Jonathan M. Bryan, deceased, wherein the court foreclosed certain mortgages in favor of Kales, and ordered certain lands to be sold in satisfaction of the judgment therein rendered. The plaintiff attacks the decree and order of sale as invalid, prays that the certificates of sale and the deeds executed to the purchasers under the sale made in pursuance of the decree, be declared void. That the defendants and each of them be declared to hold the lands so sold to them, in trust for plaintiff. That the several defendants be compelled to convey the portions held by them, to plaintiff upon plaintiff complying with such terms as the court should deem equitable. That the title be divested out of defendants and each of them, and be vested in plaintiff, and that each of the defendants be enjoined from selling, conveying, or in any manner encumbering said property.

The case made by the bill of complaint, omitting formal and immaterial matters, is substantially thus:

That Jonathan M. Bryan died intestate on or about August 29th, 1883; and that at the date of his death, he was the owner and seized in fee of a certain block in the City of Phœnix, and three certain quarter-sections of land, all described in the complaint, and all in Maricopa County, Arizona. That on or about September 24th, 1883, letters of administration upon his estate were taken out by defendant, Kales, who immediately qualified as administrator, and entered upon the discharge of his duties, and continued to act as administrator until he was discharged by the Probate of Maricopa County on December 6th, 1884; since which last mentioned date, there has been no administration on said estate, no necessity for one, and no one entitled to administer thereon.

That during the lifetime of Jonathan M. Bryan, and while he was the owner of said lands, he executed to defendant, Kales, four certain promissory notes, and to secure their payment, four certain mortgages on said lands described in the complaint. The notes and mortgages are set out *totidem verbis*.

That said Kales before any of said notes became due, or any of them had been presented for allowance, as claims against said Bryan's estate, or to any executor or administrator of said estate, or to the probate judge or court having jurisdiction thereof, and before the same or any of them had been allowed or rejected, or in any way acted upon by any executor, administrator, or probate judge, or probate court, or by any person, or by any court having charge of said estate; and before applying to the probate court or any court having control of said estate, for any order to pay said notes or any of them, or the principal or interest on any of them, or to sell any personal property, or any lands which had been mortgaged to secure the payment of any of said notes, or any property belonging to said estate, and while holding in his hands as administrator sufficient money to pay all the principal and interest which might become due on said notes or any of them, filed on September 28th, 1883, his verified complaint in the district court of Maricopa County, Arizona, register No. 320, in his own proper person and name; and in his individual capacity against himself in his representative capacity as adminstrator of Jonathan M. Bryan's estate, to which suit there were no other parties, plaintiff or defendant, and which was entitled *M. W. Kales, plaintiff*, vs. *M. W. Kales*, administrator of the estate of J. M. Bryan, deceased,

in which he prayed judgment in his own favor against himself as administrator of said Bryan, deceased, for the amounts of said several notes, principal and interest, for attorney's fees, for a foreclosure of said mortgages, an order of sale of said property, and that he be permitted to become a purchaser at said sale, and that the purchasers be let into possession on presenting the Sheriff's deed, and for general relief.

That the summons in said action was issued on October 5th, 1883, and delivered to and served by the sheriff of Maricopa County upon said M. W. Kales, administrator, etc., on the same day. That on the next day, October 6th, 1883, said Kales as administrator of said Jonathan M. Bryan, deceased, defendant, filed his answer to said verified complaint, in which he admitted each and every material allegation in said complaint, and consented that judgment and decree be entered in accordance with the prayer thereof.

That on the 16th day of October, 1883, a judgment and decree was rendered in favor of said Kales against said Kales, administrator, etc., for the amount of said notes, with foreclosure of said mortgages, with an order of sale of said property, with authority to plaintiff to purchase at said sale, and that the sheriff, after the time allowed by law for redemption had expired, to make deeds to the purchasers of the mortgaged premises on said sale, and that said Kales as administrator, and all subsequent incumbrances be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said property, after the delivery of said sher-

iff's deed. The decree provided further for the application of the proceeds of the sale, and for the establishment of any deficiency as a claim against the estate should the property not sell for enough to satisfy the amounts for which judgment was rendered.

The complaint further states that an order of sale was issued in pursuance of said decree, on November 8th, 1883, commanding the sheriff of Maricopa County to sell said mortgaged property and make return to said district court.

That pursuant to said order of sale, defendant Orme, the sheriff of Maricopa County, advertised said property for sale, and that on December 15th, 1883, sold same in parcels as follows:

To defendant, Garside, the SE. ¼ of Section 33;

To defendant, Kales, the NE. ¼ of section 5;

To defendant, Gilson, the SE. ¼ of section 9;

To defendant, Kales, block 98 in Phœnix. All being the same property described in the mortgages and in the complaint and decree of the court.

That said several tracts sold for less than each was worth in open market, and much less than each would have brought at a regular and usual sheriff's sale.

That said sheriff upon sale delivered to said several puchasers the usual sheriff's certificates of sale for the respective pieces so sold; and that on December 20th, 1883, he made his return, but none of the sales had ever been confirmed by said district court.

That after the said sale and before the making of any deed by said sheriff, defendant Kales assigned to defendant J. T. Simms, the sheriff's certificate of sale and all his rights thereunder to the NE. ¼ of

section 5, and assigned to defendant, Pinney, the sheriff's certificate of sale and all his rights thereunder to block 98 in the city of Phœnix.

That thereafter, to wit, on June 16th, 1884, said sheriff pursuant to said sale, executed and delivered to defendant Garside a sheriff's deed to the tract purchased by him, to wit, SE. ¼ Sec. 33, and that on May 26th, 1887, defendant, Garside, conveyed conveyed same to defendant J. De Barth Shorb.

That on June 10th, 1884, said sheriff pursuant to said sale and the assignment of the certificate of sale by defendant Kales to defendant J. T. Simms, executed and delivered to said J. T. Simms, a sheriff's deed to the NE. ¼ of Sec. 5, and that on February 28th, 1887, defendant J. T, Simms joined by his wife, defendant, Hannah T. Simms, conveyed same to defendant, Brassins, who has subdivided same into blocks and lots with streets running through same, now commonly known and designated as Central Place.

That on May 3rd, 1887, defendant Brassins conveyed to defendant, Jeffries, Lot 2, of block 12 in said "Central Place," and on May 5th, 1887, to defendant Ryder, Lot 1 in block 18 of said Central Place.

That on June 19th, 1884, said sheriff pursuant to said sale executed and delivered to defendant William Gilson, a sheriff's deed to the SE. ¼ of Sec. 9, and that on April 6th, 1886, defendant, William Gilson, joined by his wife, defendant Lizzie Gilson, conveyed same to defendant Cordelia L. Beckett, the wife of defendant C. G. Beckett.

That on June 16th, 1884, said sheriff pursuant to

said sale and the said assignment of certificate of sale by said Kales, to defendant, Pinney, executed and delivered to said Pinney a sheriff's deed to said Block 98 in the city of Phœnix, and that said Pinney on September 10th, 1886, conveyed a portion thereof, viz. Lot 10, to defendant, the Bank of Napa, a corporation existing under the laws of the State of California. That on November 18th, 1886, said Pinney conveyed other portions of said block, viz. lots 1, 3, 5, 7 and 9, to defendant F. Q. Story, who, on December 6th, 1886, conveyed all of the last mentioned lots to defendant Sherman.

That at the time of the death of Jonathan M. Bryan, Vina Bryan was and had been long prior thereto, his wife, and did survive him without issue, and that said Jonathan M. Bryan left no descendants. That all of the property mentioned in the bill, was acquired by said Jonathan M. Bryan during his marriage with said Vina Bryan, and was at the time of his death the common property of himself and said Vina, his wife, and that upon his death she became his sole heir, and that all of said common property did then and there descend to and remain in her until June 29th, 1887, when for good and valuable consideration she conveyed same to Thomas J. Bryan, the plaintiff herein.

That said Vina Bryan had never consented to or affirmed any of the sales, deeds, certificates of sales, conveyances or proceedings made by the defendants, or by said District Court, or Probate Court, or said sheriff, but had always affirmed, and her grantee, plaintiff Thomas J. Bryan had always affirmed and does now affirm that all of same were unwarranted, against equity, and without authority of law.

That all and each of the defendants had at all the time mentioned in the bill, full notice of all the facts alleged therein.

That defendant Pinney was the Judge of said District Court, and presided as such in all the proceedings had in said action wherein defendant M. W. Kales was plaintiff and M. W. Kales as administrator of the estate of J. M. Bryan, deceased, was defendant, and rendered and made said decree of foreclosure and order of sale therein, and was the judge of said District Court at the time of the assignment to him by said defendant M. W. Kales of the Sheriff's certificate of sale of said Block No. 98, in the City of Phœnix, and also at the time of the execution and delivery to him by said Sheriff of the Sheriff's deed therefor. And that the premises described in the complaint are of the value of $125,000. The facts are all elaborately set up in the complaint.

To this complaint, defendants all interposed among other things demurrers, to the effect that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were argued November 11th, 1887, and taken under advisement by the Court until December 27th, 1887, when the Court sustained them, upon the ground that "it appeared from the complaint that plaintiff had been guilty of laches, and too great delay in bringing the said action, and that the complaint did not allege any reason for his delay in commencing said action;" to which ruling, plaintiff then and there duly excepted. (See transcript page 65.) On same day the Court granted plaintiff one day to amend his complaint.

On December 29th, 1887, plaintiff refusing to amend, the court dismissed the cause and rendered judgment against plaintiff for costs. On the same day, plaintiff filed his motion for new trial, which was overruled by the court. Plaintiff excepted and gave notice of appeal to the supreme court of the territory.

On February 13th, 1889, the supreme court of the territory affirmed the judgment of the district court, on the distinct and *only* ground of laches in plaintff not bringing his action sooner, to which plaintiff then and there duly excepted, and gave notice of appeal to this Court.

Assignment of Errors.

Plaintiff assigns for error that the territorial supreme court erred—

First. In affirming the judgment of the district court.

Second. In adjudging that appellant, Bryan, had been guilty of laches in bringing his suit.

Third. In sustaining defendants' demurrers to plaintiff's complaint.

Fourth. In dismissing plaintiff's complaint and rendering judgment for defendants.

Fifth. That the judgment is contrary to law.

Sixth. For other causes apparent of record.

Seventh. In not rendering judgment for appellant.

Argument.

The single question presented by the record, is: Does plaintiff's complaint show on its face that he was guilty of laches or delay in bringing his suit?

It is apparent that as used and understood by the District Court and by the Supreme Court of the Territory, they mean the same thing.

We will discuss the case from two points of view:

First. We contend that under the law in this Territory, a court of equity is as much bound by the statute of limitations as a court of law.

The learned justice of the Territorial Supreme Court, who delivered the opinion in this case, says: "It is true that in an action at law under the statute (of limitations), five years to commence an action is allowed." Section 3, Chapter XXXV, of the Compiled Laws of Arizona 1877, page 556, provides that "No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within five years before the commencement of such action." Section 1 of same chapter, same page, provides that "Civil actions can only be commenced within the periods prescribed in this act after the cause of action shall have accrued, except where a different limitation is prescribed by statute." Section 1 of Chapter 48, Compiled Laws of 1877, page 409, provides that "There shall be in this Territory but one form of civil

action for the enforcement or protection of private rights and the redress of private wrongs." The 38th section of Chapter 48, p. 414, confines the pleadings of plaintiff to the complaint, and demurrer to defendant's answer, and those of defendant, to the demurrer or answer. The 39th section, same page, provides that the complaint shall contain (after specifying title of the action, court, &c.), "a statement of the facts constituting the cause of action in ordinary and concise language." These sections correspond precisely with sections 316, 312, 307, 422, and 426 of the California Code of Civil procedure.

In the case of *Hardy* vs. *Hardin*, 4 Sawyer's Rep., page 548, where, as we understand the report of the case, this same statute of limitation was pleaded, the Court, citing *Lord* vs. *Morris*, 18 Cala., page 486, say, that the statute applies both to equitable and to legal remedies. To the same effect, is *White* vs. *Sheldon*, 4 Nevada Rep., pages 288-9; *Rogers* vs. *Brown*, 61 Mo., 187, 191; *Kelly* vs. *Hurt*, 61 Mo., 463; *Smith* vs. *Fly*, 24 Tex., 351-2; Wood on Limitations of Actions, page 115, Sec. 58.

Second. But granting we are wrong in our first point, we contend that the complaint does not show laches on its face.

Defendants' demurrer admits the allegations of the complaint. Unless the mere delay to bring the suit before the period prescribed as a bar by the statute of limitations had expired, is laches; the Court erred in affirming the judgment of the District Court, for surely the complaint does not show that defendants were induced to do anything by any act of plaintiff or his grantor, Vina Bryan.

"Where an express statute of limitations applies to a suit in equity, *mere delay* to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceedings."

Lux vs. *Haggin*, 69 Cala., (page 267);
Williams vs. *Conger*, 49 Texas Rep. (page 602).

"To create an estoppel in pais," says the Supreme Court of California, in *Biddle Boggs* vs. *Merced Mining Co.*, 14th Cala., (p. 367), *et seq*, "it must appear that the party making the admission by his declarations or conduct was apprised of the true state of his own title; *Second*, that he made the admission with the *express intention to deceive*, or with such careless and culpable negligence as to amount to constructive fraud; *Third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."

See, also, *Lux* vs. *Haggin*, 69 Cala., (page 266);
Brant vs. *Virginia Coal and Iron Mining Co.*, 93 U. S., 336;
Steel vs. *Smelting Co.*, 106 U. S., (page 456).

It is averred, in the complaint, that the defendants and each of them had full notice of all the facts alleged therein, one of which was that Mrs. Vina Bryan became the owner of the lands in question, and the demurrer admits the allegations to be true.

The only reason given by the Supreme Court of the Territory for sustaining the judgment of the District Court is that given by the District Court in sustaining the defendant's demurrer, to wit: "Because of laches in not bringing this action sooner." (See Record, p. 70.)

The court says it appears that the grantor of plaintiff stood by and saw all this property sold, and had a right to redeem the same in six months after the sale. That her residence was in Maricopa County at the time of the death of her husband, and its continuance will be presumed to be there, the contrary not having been alleged. That there was no action brought to set aside the judgment. That from the 8th day of November, 1883, till the 9th day of June, 1887, nearly four years, she saw the property greatly enhancing in value, saw it sold time and time again, then sells to the plaintiff, who now comes into a court of equity and asks a cancellation of all those sales. (See Record, p. 70). We quote further: "If, in any case, the principle that the delay which will defeat a recovery will apply, it is the one at bar, the presence of the grantor of the plaintiff, seeing improvements on the property, seeing it first gradually improving from year to year, and then daily enhancing in value, and when the "boom" was reaching its acme selling to the plaintiff, who seeks to acquire this property, which sold at public vendue for about $5,000.00, and alleged to be worth $125,000." We have quoted thus fully from the opinion to show that the only reason given for affirming the judgment, was mere delay in bringing the suit.

Now, with all respect to the Supreme Court of the Territory, we ask where does it appear from the face of the complaint, or from anything in it, from which it can be fairly infered, that Mrs. Vina Bryan, plaintiff's grantor, ever did reside in Maricopa County, or ever knew anything about the property enhancing in value, or being sold from time to time, or that there ever was a "boom," or that she ever saw improvements on this property. But to the question of delay, "where one party invades the right of another, that other does not in general deprive himself of the right of seeking redness merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations."

Wood on Limitations, Sec. 62;
Moss vs. *Berry*, 53 Texas, 633.

There must be more than mere acquiescence or delay; there must be "assent." (*Lux* vs. *Haggin*, 69 Cal., page 270, *et seq.*;) and authorities there cited.

But it may be argued that the standing silently by and seeing the property change hands on the part of Vina Bryan, the grantor of plaintiff, and not pretesting would estop plaintiff. The rule, as we understand it is, that silence without fraud, that is, mere silence, accompanied by any act calculated to mislead or deceive another to his hurt, never estops a party from asserting title to his own. (*Railroad Co. vs. Dubois*, 12 Wal.) In such cases there must be not only an opportunity to speak, which was not embraced, but there must be an imperative duty to speak. (Bigelow on Estoppel, 4th Ed., page 575.)

This is well illustrated in the cases of *Lux* vs. *Haggin*, 69 Cala., page 259, *et seq.*; *Stockman* vs. *Riverside*, L. & I. Co., 64 Cala., 57; *Kelly* vs. *Hurt*, 61 Mo., 463; *Fielding & Gwynn* vs. *DuBose*, 63 Tex., 637; *Hill* vs. *Epley*, 7 Casey, 31 Pa. St., page 334; *Knouff* vs. *Thompson*, 4 Harris, 16 Pa. St., 357; *Bales* vs. *Perry*, 51 Mo., 449; *Strong* vs. *Ellsworth*, 26 Verm., p. 367; *Sulphine* vs. *Dunbar*, 55 Miss., 255; *Mason* vs. *Philbrook*, 70 Maine, 57; *Rice* vs. *Dewey*, 54 Barb., 455; *Mayo* vs. *Cortwright*, 30 Ark., 407; *Neal* vs. *Gregory*, 19 Fla., 356; *Bramble* vs. *Kingsbury*, 39 Ark., 131; *Terre Haute Rd.* vs. *Rodel*, 89 Ind., 128; *Viele* vs. *Judson*, 82 N. Y., p. 32; *Diffenback* vs. *Vogler*, 61 Md., 370; *Meeley* vs. *Collins*, 41 Cal., 663; S. C. 10 Am. Rep., 279. In *Stockman* vs. *Riverside*, L. & I. Co., 64 Cal., 57, the defendant stood silently by and saw plaintiffs construct a canal at a cost of about fifteen thousand dollars, and maintain and use it, including a strip of land on each side of it for the purpose of conducting water for irrigation with the knowledge of plaintiffs and their grantors, and without objection on their part, for five years or more. But the court held that that bare fact alone did not constitute an estoppel. "There must be," says the court, "some degree of moral turpitude in the conduct of a party, before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." (*Riddle Boggs* vs. *Merced Mining Co.*, 14 Cal., 368). In *Knouff* vs. *Thompson*, 4 Harris, 16 Penn. St., 357, the plaintiff lived within two hundred yards of the demanded premises for years; saw defendants and their grantors improving them all the time from

March 2d, 1829, to January 16th, 1850, fourteen years after plaintiff became of age, and but one month and sixteen days before the claim would have been barred by the statute of limitation, without notice or protest, and yet the court held that there was no estoppel, and draws the distinction between mere silence and encouragement.

In *Meely* vs. *Collins*, 41 Cal., 663, the defendant claimed to be an innocent purchaser, derainging his title through a forged deed which had been of record for more than five years, of which plaintiff had notice. It was urged plaintiff was estopped because she permitted the parties to deal with the property as their own, and because she failed to sue for five years after she knew the forged deed was of record. The court held she was not estopped, on the ground that plaintiff had done nothing to induce the defendant to make the purchase.

In White and Tudor's leading cases in equity, 4th American edition, Hare and Wallace, Vol. 2, part 1, notes to *Basset* vs. *Nosworthy*, top page 30, marginal page 33, we find the rule stated thus: "The distinction seems to be between participation or procurement and silence and acquiescence, the one imposing no liability, unless there is wilful concealment or fraud, while the other may create a bar by rendering it more just to throw the loss on him who has occasioned it than on a purchaser who has been induced to buy by an assurance which, though made in faith, proves to be unfounded," and cites a number of cases sustaining this doctrine. In Vol. 2, part 2, 8th edition of Smith's leading cases in the notes to the Duchess of Kingston case, page 890-2, the

law, as deduced from the cases, is stated to be substantially as follows: "The rule, precluding a man from claiming his own, is in a high degree penal, and ought not to be enforced if justice can be attained without a forfeiture. The language or conduct of the owner must be the direct inducement which causes another to change his position to his injury; the silence or concealment must be fraudulent, or marked with such gross negligence and indifference to the rights of others as to be equivalent to actual premeditated fraud. Good faith and diligence must concur with the want of them on the other, and an estoppel will not arise in the absence of actual fraud unless the purchaser was destitute not only of all actual knowledge of the true state of the title, but of the means of acquiring knowledge by a recourse to the record. When the title has once been recorded, no responsibility will arise from a failure to take further steps to warn subsequent purchasers who may fairly be presumed to have used the means pointed out by the law, and acquired all the knowledge which it is important for them to have. It is only when silence becomes a fraud that it postpones, and the difference is plain between standing by without taking measures to stop a sale or warn a purchaser, or even answering such questions as he may choose to put, and taking an active part in the transaction or inducing him to buy by advice or persuasion. In *Wood* vs. *Carpentier*, 101 U. S., p. 143, the Supreme Court say: "Concealment by mere silence, is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing in

effect, as knowledge itself." Defendants claim under a purchase at a judicial sale. The rule of caveat emptor applies. The Monte allegre, 9 Wheat., 648.

The purchaser must see that his title is good, or take the consequences. (*Williamson* vs. *Berry*, 8 How., U. S. 548.)

Defendants are in no sense innocent purchasers without notice. The law binds them to look to every document essential to the validity of their title. (*Brush* vs. *Ware*, 15 Pet., p. 93; *Hardy* vs. *Harkin*, 4 Sawyer, 545.)

The complaint alleges facts which show that the decree and sale thereunder by the sheriff under which defendants claim title, is invalid, and charges that defendants had full notice of these facts. Had they looked to the record of the suit of *Kales* vs. *Kale's Administrator*, as they were bound to do, the defect in the title would have been apparent.

One thing more. It is averred in the complaint that the estate of Bryan was closed and the Administrator discharged December 6th, 1884. Under the statutes of this Territory, neither Vina Bryan, nor her grantee the plaintiff in this suit, could sue until the estate of Jonathan M. Bryan was closed. Section 114, Chapter 29, Compiled Laws of Arizona, of 1877, page 271 gives to the executor or administrator, the right of possession of all real and personal property, and the right to receive the rents and profits of real estate until the estate is settled or delivered over by order of the Court or Probate Judge. Section 194, same Chap., p. 289, does the same thing, and in addition provides that the possession of the executor or administrator shall be deemed the pos-

session of the heirs or devisees for the purpose of bringing suits to quiet title or for partition of estates; but "such possession by the heirs or devisees shall be subject, however, to the possession of the executor or administrator for all other purposes."

Section 195 provides that "actions for the recovery of any property, real or personal, or for the possession thereof * * * * may be maintained by and against executors or administrators in cases in which the same might have been maintained by or against their respective testators or intestates. These sections are copies of the same sections of the California probate acts, in force in that State before the adoption of the Codes January 1st, 1873, *Crosby* v. *Dowd*, 61 Cal., 557–600, and have always been construed to prohibit heirs from maintaining suits for recovery of real estate pending administration. (*Crosby* v. *Dowd*, supra; *Meeks* v. *Hahn*, 20 Cal., 627; *Meeks* v. *Kirby*, 47 Cal., 168; *Chapman* v. *Hollister*, 42 Cal., 463; *Meeks* v. *Vassault*, 3 Sawy., 206.

Section 24 Chap. 35 Comp. Laws Arizona, p. 360, provides that "when the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action."

It follows, then, that the earliest period at which plaintiff or his grantor, Vina Bryan, could sue, was December 6th, 1884, and that only two years, seven months and twelve days had elapsed after that date, before suit was brought July 18th, 1887, which is long short of the period of limitations prescribed by our statute.

We respectfully urge that the case of *Harwood* vs. *Railroad Company*, 17 Wall., 78, cited by the Supreme Court of the Territory to sustain their argument does not apply to the facts of this case. In the first place there was in that case a fatal defect of parties. In the second place, more than five years had elapsed between the rendition of the judgment and the sale sought to be set aside and the filing of plaintiff's action. In the third place, if we understand the case from the meager statement found in the Report, Carlisle, the plaintiff in the judgment attached, was trustee for the plaintiff in that case, and, of course, represented him in his capacity of trustee, as he did all the other stockholders, and therefore plaintiff was bound by the judgment. Here, an entirely different state of facts exist, as the record shows. The complaint alleges that the property in controversy was acquired after the marriage of Jonathan H. Bryan, and Vina Bryan, his wife, and is community property. (See record, p. 16.) All property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise and descent, shall be common property. See Compiled Laws of Arizona, 1877, p. 328, Sec. 2, Chap. 32; *Scott* vs. *Ward*, 13 Cal., 470; *Pixley* vs. *Huggins*, 15 Cal., 241, 398; *Schouler* vs. *Sav. & L. Soc.*, 64 *Cal.*, 398. It alleges further that, after his death, said property descended to and vested in her as surviving widow. (See record, p. 16.) Upon the death of either spouse without descendants, the whole of the common property shall go to the survivor, subject to debts of estate. Compiled Laws of Arizona, Chap. 32, Sec. 11, p. 329; *Broad* vs. *Broad*, 40 Cal., p. 493; *De Godey* vs.

Godey, 39 Cal., p. 164; *Payne* vs. *Payne*, 18 Cal., p. 301; Estate of Silvey, 42 Cal., pp. 213, 463; Estate of Frey, 52 Cal., p. 658; *Paunaud* vs. *Jones*, 1 Cal., p. 513; *Becket* vs. *Selover*, 7 Cal., 215, 229.

We respectfully submit that the judgment of the Supreme Court of Arizona Territory ought to be reversed, and the case be remanded for a new trial.

GOODRICH & STREET,
and WM. A. McKENNEY,
Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

THOMAS J. BRYAN,
Appellant.

vs.

M. W. KALES, L. H. ORME, (Sheriff), ROBERT GARSIDE, WILLIAM GILSON LIZZIE GILSON, J. DEBARTH SHORB, J. T. SIMMS, HANNAH T. SIMMS, ROBERT T. BRASSIUS, JOHN W. JEFFRIES, HENRY W. RIDER, CORDELIA L. BECKETT, C. G. BECKETT, D. H. PINNEY, THE BANK OF NAPA, a Corporation, F. Q. STORY and M. H. SHERMAN, *Appellees.*

No. 1,287.

Appeal from the Supreme Court of the Territory of Arizona.

CASE SUBMITTED UNDER RULE 20.

CLARK CHURCHILL
and W. PINKNEY WHYTE,
Attorneys for Appellees.

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CASE SUBMITTED UNDER RULE 20.

STATEMENT.

This is a suit in equity. The bill of complaint was filed in the District Court of the Second Judicial District of the Territory of Arizona for Mariposa county, on the 18th July, 1887.

It is set out in the Record from page 1 to 18, inclusive.

It alleges that the plaintiff, and some of the defendants, reside in that county, while some of them live beyond the

territory; that one Jonathan M. Bryan, on or about the 20th August, 1883, died intestate, and at his death, was the owner, seized and possessed of certain tracts of land described in the bill. Record, 1 and 2.

That on or about the 24th September, 1883, letters of administration on the intestate's estate were granted to M. W. Kales, who duly qualified and performed his duties until discharged on the 6th day of December, 1884.

That during his lifetime, Jonathan M. Bryan executed to said M. W. Kales his four promissory notes at the times and for the amounts in said notes expressed, which are severally described in the Record, pages 2 and 3.

That said Jonathan M. Bryan, to secure the payment of these notes, executed four several mortgages on said lands, or a portion of them, as described in said mortgages, which are set out in the Record, on pages 3 to 9, inclusive. That by the terms of said notes and mortgages on non-payment of interest they all became due before September, 1883.

That said Kales, without presentation for allowance of his debts in the Probate Court, commenced an action in the District Court of the Second Judicial District for Mariposa county, in his own proper person and name, and in his individual capacity, against himself in his representative capacity as administrator, and made answer to the complaint in such representative capacity. That said suit was filed in said Court on 28th September, 1883, and summons issued on 5th day of October, 1883. Record, pages 9 and 10.

That a judgment and decree was entered in favor of the plaintiff in said suit on 16th October, 1883.

The decree is set out in full in Record, on pages 11 to 14, inclusive.

That on the 8th November, 1883, the District Court made an order of sale of said premises, and in pursuance thereof sales were made of the different parcels of land, the defendant, Robert Garside, being the purchaser of one piece, M.

W. Kales of two other separate pieces, and defendant, William Gilson of another portion; that after the sales, and before the making of any deeds by the sheriff, Kales sold one quarter section to J. T. Simms, and the certificate of purchase was set over to Simms; that Kales, before the making of any deed, assigned to defendant D. H. Pinney, block 98 of the city of Phœnix, it being a part purchased by Kales at sheriff's sale; that on June 16, 1884, the sheriff executed and delivered to Garside a deed of the part he bought, and that Garside, on May 27, 1887, sold the same to defendant J. De Barth Shorb; that on June 10, 1884, the sheriff executed and delivered a deed to Simms, as assignee of the certificate of purchase from Kales, of the parcel of land so purchased by him; that defendant Simms, on February 28, 1887, sold the same to defendant George T. Brassius, *who subdivided the same into blocks and lots, with streets running through said property, which is now known and designated as "Central Place;"* that Brassius sold a lot therein to John W. Jeffries on May 3, 1887, and on May 5, 1887, sold another lot to defendant Henry W. Ryder; that on June 19, 1884, the sheriff executed a deed to defendant William Gilson for the part purchased by him, who, on April 6, 1886, sold the same to defendant Cordelia L. Beckett; that on the 16th day of June, 1884, the sheriff executed a deed to D. H. Pinney, who, on the 10th day of September, 1886, sold a portion thereof to defendant the Bank of Napa, Cal., and that said Pinney, on November 18, 1886, conveyed another part of said block to defendant F. Q. Story, who thereafter sold the same to defendant M. H. Sherman, who is now in possession of the same. The bill further states that, at the time of the death of said Jonathan M. Bryan, Vina Bryan was the wife of Bryan, and did survive him without issue, and said Bryan left no descendants; that all of the property was community property, and that she thus acquired title to the property, and so held the same, until the 29th day of June, 1887, when she conveyed the same to plaintiff, Thomas J. Bryan, for a good and valuable consid-

eration. The bill alleges that the price bid and paid for each respective piece of property was an inferior price, and less than each was worth in open market; that of all the facts so alleged the defendants, and each of them, had full notice; that the defendant D. H. Pinney was the judge of the District Court, and acted as such in all the proceedings had in said action, and was the judge of said Court at the time of the assignment of the certificates of sale to him. The prayer of the bill is that all the proceedings made by the District Court in the action where M. W. Kales was plaintiff and M. W. Kales was administrator, be annulled, and the sales and certificates of sale be declared void, and the different parcels of the property conveyed, or attempted to be conveyed, be decreed to have been received with notice and in trust for Vina Bryan and her grantee, this plaintiff; that it be decreed that each respective part be decreed to be held in trust for this plaintiff, and that each of the defendants claiming to own any portion of said land by each, respectively, do convey to the plaintiff; that they be enjoined from selling the same.

Record, pages 14 to 18, inclusive.

The property, which brought, at the sheriff's sale under the foreclosure proceedings, $6,925, is stated to be worth, at the time of filing this bill of complaint, at least $125,000.

It is not denied that Vina Bryan knew of all these proceedings, nor is it alleged that she had no such knowledge, nor is it denied that the debts were due, owing and unpaid, and are still unpaid, except by the application of the proceeds of sale aforesaid by the sheriff. There was no defence to the foreclosure suit, and there could have been no other result had Vina Bryan been made a party to the same.

The defendants demurred to the bill upon several grounds, and among them that the bill is insufficient to require them to answer thereto. The District Court sustained the demurrer, because "it appeared from the complaint that the

plaintiff had been guilty of laches and too great delay in bringing the said action, and that the complaint did not allege any reason for his delay in commencing said action."

Record, page 65.

On the 29th December, 1887, the District Court passed a decree dismissing the suit and action.

Record, page 65.

The plaintiff excepted to this ruling. Leave was granted to the plaintiff to amend, which he refused to do. The plaintiff also moved for a new trial, which was denied. From this decree, and the order refusing to grant a new trial, the plaintiff appealed to the Supreme Court of the Territory of Arizona, and on the 13th February, 1889, the judgment and decree of the District Court aforesaid, was affirmed by the Supreme Court The demurrer was sustained and the bill dismissed. Record, page 65. The appeal in this case is from that final judgment and decree, affirming the judgment of the District Court of the Second Judicial District of the Territory of Arizona, which judgment and decree sustained the demurrer of the defendants, now appellees, and dismissed the bill.

Record, page 72.

The errors assigned are that the Supreme Court of the Territory erred:

1. In affirming the judgment of the District Court.

2. In adjudging that appellant, Bryan, had been guilty of laches in bringing his suit.

3. In sustaining defendant's demurrers to plaintiff's complaint.

4. In dismissing plaintiff's complaint and rendering judgment for defendants.

5. That the judgment is contrary to law.

6. For other causes apparent of record.
7. In not rendering judgment for appellant.

Record, page 78.

All of which will be considered by the appellees under the two inquiries:

1. Did the bill disclose a case sufficient to set in motion the active aid of a Court of Equity?

2. Was there not such laches in filing the bill, as to justify a Court of Equity in refusing relief?

ARGUMENT.

1. Both of these questions were properly raised by the interposition of a demurrer.

"A defence grounded upon the staleness of the claim asserted or upon the gross laches of the party asserting it, may be made by demurrer, not necessarily by plea or answer."

It is undoubtedly, the doctrine established by the Supreme Court.

"The proper rule of pleading would seem to be, that when the case stated by the bill appears to be one, in which a Court of Equity will refuse its aid, the defendant should be permitted to resist by demurrer. And as the laches of the complainant in asserting his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the Court.

Landsdale vs. Smith, 106 U. S. 393, and cases cited therein.

Speidel vs. Henrici, 120 U. S. 387.

The property was sold on the 15th December, 1883, by the Sheriff, who made deeds to the purchasers, under which they took possession, June 16, 1884, and this suit brought

in July, 1887, is the first step taken to avoid the said judgment or sales.

On the 29th June, 1887, said Vina Bryan, conveyed the said lands to the plaintiff, prior to which time the plaintiff had no interest in the property which was sold and entered upon more than three years prior to the said conveyance.

All that, it is claimed, entitles plaintiff to have the judgment and sale set aside is the fact that Vina Bryan, plaintiff's grantor, was not made a party defendant.

The reply is obvious:

She was a party defendant in contemplation of law. The administrator represented her (as the heir) as well as the creditors of deceased, and the rule is well settled that under the system of administration in the Territory of Arizona upon the estates of deceased persons, a judgment against the administrator estops the heir as well as the creditors.

Bayly vs. Muehe, 65 Cal. Reps., page 345.
Cunningham vs. Ashley, 45 Cal. Reps., page 485.

The judgment in the foreclosure suit was not void, and under the showing made by the complaint in this case it is not voidable. The Court had jurisdiction over the subject-matter and of the parties, and that is all that is necessary to establish the validity of the adjudication.

Freeman on Judgments, secs. 116, 134, 135.

She was not a necessary party to the foreclosure suit.

There is practically no distinction between the title derived by a married woman upon the death of her husband, by reason of her supposed prior interest in the common property, and the title which she inherits from her deceased husband as his share of the common property.

See Compiled Laws Ariz. 1877, Par. 1977, page 329.

In case there is no issue, (as alleged in the complaint), the

wife takes all the common property, subject to the payment of the debts of the deceased.

Ibid.

If the wife has any estate in the property acquired subsequent to the execution of the mortgages by deceased to Kales, as is contended by plaintiff's counsel, then she would have been a proper party to the foreclosure suit, except for the existence of the rule above stated, that she was, in contemplation of law, a party, because she was represented in the suit by the administrator, and she being in that suit in that manner, she had the right (in case the administrator, her trustee and representative therein, was acting in bad faith or in violation of her interests,) to be heard, and the Court would have permitted her to come in and defend the foreclosure suit if she had applied for that privilege upon the above ground; but she did not make any application. She sat by and made no objection, probably because (and the presumption now is after so long a silence,) she agreed to the proceeding. She had no defense and it would have been idle for her to interfere. Vina Bryan, having then agreed to the rendition of the judgment of foreclosure, and the sale and other proceedings at that time, will not be allowed to withdraw from that agreement without some special showing, which is not made in this complaint. If the judgment which she then agreed to is now held to be a nullity, so that the parties are to be relegated to the same position they were in before its rendition, the mortgages will be barred by the statute of limitations. To allow her or her grantee to withdraw from that agreement now would, upon the showing in the complaint, operate as a fraud on defendants who have paid their money for the lands, and Courts of Equity require the complainant in all cases to come into Court with "clean hands," and they never lend aid to the perpetration of fraud.

But according to the theory of plaintiff in the case, that the legal title passed to defendants, in whom it now rests,

then the cause of action, (if any,) set out in the complaint, is not shown by the complaint to have been assigned to plaintiff, and it therefore remains in Vina Bryan, who is not a party to this suit. The allegation is that she conveyed the lands described in the complaint, to plaintiff, whereas she had no land according to her own showing, but simply a grievance, which it is claimed might have entitled her to bring an action to recover the lands. There is nothing in the complaint showing that the alleged injury to Vina Bryan was transferred to plaintiff, and plaintiff took whatever interest Vina Bryan conveyed to him, subject to all the irregularities (if any,) in the foreclosure proceeding.

Freeman on Judgments, sec. 91, and cases cited.
Rorer on Sales, sec. 405.
Perry on Trusts, secs. 197, 198.

It is contended by the appellant that the notes were not due at the time Kales commenced suit to foreclose the mortgage, except as they were declared to be due by reason of the default in the payment of the interest; and that said Vina Bryan never at any time consented to the sales, deeds or conveyances or proceedings, but always affirmed that the sales were unwarranted and void. And it seems to be asserted that the doctrine of laches did not apply because of the allegation to the effect that said Vina Bryan did not consent to the proceedings. The reply to all this is obvious. The complaint shows that the whole debt was owing from the deceased Bryan to Kales, that the only payment of the debt was by the sale of the property which is now sought to be set aside; that Kales was appointed administrator of the estate of said deceased, September 24, 1883, and immediately thereafter entered upon the discharge of the duties of his office, and continued thenceforth to be such administrator until his discharge therefrom by the Probate Court, December 6, 1884, and that since he was discharged, December 6, 1884, there has been no administrator of said

estate, nor any one entitled to administer thereon, nor any necessity therefor; and further, it appears by inspection of the complaint in this case, that the suit brought by Kales to foreclose the mortgage was commenced September 28, 1883, while one of the notes upon its face, to wit: the note fourthly set out, was actually due and payable September 14, 1883, fourteen days before the commencement of suit, by its expressed terms, and it appears upon the face of the complaint, that in making payments of the indebtedness of the deceased, the said Kales acted as administrator under the supervision and direction of the Probate Court, together with the fact that he was thereafter regularly discharged, and if it be true as alleged in the complaint, that there was no necessity for any further administration, this fact rebuts the other allegation that said Kales had moneys in his hands belonging to the estate, which it was his duty to apply in the payments of these mortgages, and which he did not apply thereto; for if, there were any such funds applicable to the payment of the notes of Kales which he failed to apply in that manner, there *was* a necessity for a further administration of the estate, and this necessity being expressly denied by plaintiff, this denial carries with it a denial of the fact that there were such funds misapplied or unapplied by Kales. It will be observed that the complaint in this case fails to state that there were enough funds in the hands of said Kales, administrator, to pay these notes, and the other debts of the estate, but it simply alleges that while holding in his hands as administrator sufficient money to pay all the principal and interest which might become due on said notes or any of them, he entered an action in the District Court in his own proper person, &c., and that he declared upon said notes and mortgages and prayed for judgment.

It might well be that he had sufficient moneys in his hands for these purposes if it were all applied to these purposes exclusively, without providing for the payment of the other indebtedness of the estate, the espenses of administration or preferred claims; and beyond all this it may have

been his duty, for all that appears upon this complaint, to have applied it to payment of those other debts and claims gaainst the estate; and in the absence of any allegation it will be presumed he did his duty. In short, the whole complaint taken together shows clearly that these notes held by Kales, secured by mortgage, were owing to him by J. M. Bryan when he died, but that they have never been paid; that there were no funds wherewith to pay them which were applicable to their payment, except by the sale of the mortgaged property; that the present plaintiff now seeks to recover the property without making any provision or having provided for that indebtedness or removed those liens, and that if the plaintiff were allowed to recover judgment as prayed in the complaint for the recovery of the property in this action, that it would operate to defeat the payment of the just debts of the deceased Bryan, and to deprive those who purchased the property, and thereby paid those debts, of the fruits of their purchase without any fault on their part. All the said notes are now barred by the statute of limitation; the note first set out in the complaint was barred December 12, 1887; the second note February 23, 1888; the third note October 26, 1887; the fourth note September 4, 1887.

2. But the defence of laches is conclusive against the plaintiff in this case.

The grantor of the plaintiff stood by and saw all this property sold, and had a right to redeem it in six months after the sale. She resided, it is presumed, with her husband during his life, and there is no allegation that she had gone elsewhere after his death in Mariposa county; and from the time of the institution of the foreclosure proceedings, down to June, 1887, when she made the deed to the plaintiff, she took no action whatever to set aside the proceedings, although she had a right to redeem within six months after the sale; from the 8th December, 1883 to June, 1887, nearly four years, she saw the property changing hands, being sold in

lots, and enhancing in value, from $6,925 to $125,000, and, she is lying by, while all this goes on; when she sees an opportunity to profit by her silence, she conveys her interest, if she had any, to the plaintiff, who asks a Court of Equity, in the exercise of a sound discretion, to cancel all these sales. It cannot be, that such delay on the assertion of a supposed right will be tolerated by a Court of Equity.

There is no excuse whatever set up in the bill, to relieve her or the plaintiff of the charge of negligence in the prosecution of his claim.

In the case of Harwood vs. Railroad Co., 17 Wall. 78, it appears that "Harwood and others, representing that they were stockholders in the Cincinnati & Chicago Railroad, filed on the 25th of December, 1865, a bill in the District Court against the Air-Line Company and others, to vacate a decree rendered in the same Court in the early part of the year 1860, in a suit by George Carlisle as trustee of a second mortgage on the road for the benefit of a certain second issue of bonds, against the said Cincinnati & Chicago Railroad Company. The bill in the case at bar alleged fraud and collusion in that suit between Carlisle and his confederates and certain other persons, lessees of the road, and in its possession, and who had agreed to pay the interest on the mortgages. It alleged that by the concurrence of these several parties the road had been allowed to lose credit, and that the payment of interest on its second mortgage bonds was wilfully neglected in order that the property might be sold; that this arrangement had been carried out, and that the road had been sold and purchased in by the conspirators for about $25,000, when it was really worth $2,000,000 above a first mortgage of the same sum to which it was subject, and that the stockholders in the original road were injured by this collusive and fraudulent sale."

The court says: "We are of the opinion, also, that there has been too great delay in initiating this suit, and that no

sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the Courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

See also, Diefendorf vs. House, 9 How. Pr. 243.

The Key City, 14 Wall. 653.

In the absence of such excuse in a like case, Mr. Justice Grier, speaking for the Supreme Court, said: The party making the appeal should set forth in his bill specifically what were the impediments to an earlier presentation of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and where he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiry whether there is a demurrer or formal plea of the Statute of Limitations, contained in the answer.

Badger vs. Badger, 2 Wall. 95.

And of course, all this applies to the grantee, who sues in the right of the grantor, the original party in default.

This Court has enunciated the doctrine of a bar to relief in equity founded upon delay and laches, so clearly

as not to be misunderstood. Landsdale vs. Smith, 106 U. S. 391, above referred to, is a case in point. There, on 18th July, 1818, Van Ness leased for 99 years, renewable forever, to Noah Stinchcomb at a fixed annual rental, a lot in the city of Washington. The lessee took possession, made valuable improvements and remained in possession till 1833 or 1834, when Van Ness repossessed himself of the premises, under a clause in the deed, which provided for the lessor's re-entry on failure to pay the rent for a certain specified period, with the privilege on the part of the lessee to redeem the same on payment of the rent in arrear, and all costs and charges incurred by reason of the non-payment of the rent. Stinchcomb died in 1841, without, so far as the bill disclosed, any effort to repossess himself of the property. Van Ness died in 184 , and upon the division of his estate, the lot in question was assigned to Matilda E. Van Ness, one of his heirs at law, under whom and her assigns the defendants hold it. The complainant, as administratrix of Stinchcomb, having offered, and in the bill again offering to pay all rents, interest, charges and costs, accrued upon the property, asks, in the bill, for a decree allowing her to redeem the property, and praying for an account of the rents, &c.

In deciding that a demurrer would properly lie in such case, the Supreme Court said: "It is plainly a case of gross laches on the part of Stinchcomb and those claiming under him. His right under the deed of 1818, to repossess himself of the premises by paying rents and charges in arrear, accrued the moment Van Ness entered. But the assertion of it could not be safely neglected for an unreasonable length of time. The bill discloses no plausible, much less sufficient explanation of the long delay ensuing after 1833, without an attempt of Stinchcomb, his representatives or his heirs, to recover the property by discharging the rents and charges in arrear, and re-entering, as might have been done, in pursuance of the provisions of that deed."

"The complainant, and those whom she represents, have slept too long upon their rights. The peace of society and

the security of property demand that the presumption of right, arising from a great lapse of time, without the assertion of an adverse claim, should not be disturbed. In such cases, sound discretion requires that the Court should withhold relief." Page 394.

Equity will refuse relief to a person who has slept upon his rights, and shows no excuse.

Speidel vs. Henrici, 120 U. S. 377.

In the language of Mr. Justice Harlan, delivering the opinion of this Court in Richards vs. Mackall, 124 U. S. 189:

"But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information during the whole of that period, of every fact now relied upon by him, appellee asks the aid of a Court of Equity to set aside the sale and conveyance, and adjudge him to be the owner of the property; and chiefly, because of a mistake of the officer in not so describing the premises in the advertisement of sale and in the conveyance, as to properly identify them. In our judgment, he is not in a position to claim the interference of a Court of Equity."

It is, however, contended that a Court of Equity, in the Territory of Arizona, is as much bound by the Statute of Limitations as a Court of law, and in consequence, that any period, short of three years, would not be sufficient to justify a Court of Equity in imputing laches to a plaintiff in the prosecution of such a claim.

But there is no such difficulty. The law of laches, like the principle of limitations of actions, is a distinct defence in equity, and was dictated by experience and is founded in a salutary policy.

In the case of Brown vs. the County of Buena Vista, 95 U. S. 160, this Court said: "The Statute of Limitations of Iowa of five years, perhaps, does not apply. * * * But a

Court of Equity applies the rule of laches *according to its own ideas of right and justice.* Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted, is sufficient to make it effectual, is a question to be resolved by the sound discretion of the Court."

"Independently of any Statute of Limitations, Courts of Equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."

"A Court of Equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity, but *conscience, good faith and reasonable diligence.* Where these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court."

Smith vs. Clay, 3 Bro. Ch. 640, note.

"This doctrine has been repeatedly recognized and acted on" in the Supreme Court.

Piatt vs. Vattier, 9 Pet. 405.
McKnight vs. Taylor, 1 How. 189.
Wagner vs. Baird, 7 How. 234.
Badger vs. Badger, 2 Wall. 87.
Hume vs. Beale, 17 Wall. 336.
Marsh vs. Whitemore, 21 Wall. 178.
Sullivan vs. Portland & Kennebec R. Co., 94 U. S. 906.
Golden vs. Kimmell, 99 U. S. 201.
Speidel vs. Henrici, 120 U. S. 387.

And where, as in the case of Speidel vs. Henrici, 120 U. S. 387, the Statute of Limitations was relied on, as a bar,

but was not so considered, the Court said: "In any aspect of the case, therefore, if it was not strictly within the Statute of Limitations, yet the plaintiff showed so little vigilance and so great laches, that the Circuit Court rightly held that *he was not entitled to relief in equity.*"

Again, in Hayward vs. National Bank, 96 U. S. 617, where four years was the time, during which the claimant was negligent, this Court said:

"Courts of Equity often treat a lapse of time, less than that prescribed by the Statute of Limitations, as a presumptive bar, on the ground of discouraging stale claims, or gross laches, or *unexplained acquiescence in the assertion of an adverse right.*"

The case of Harwood vs. R. R. Co., &c., 17 Wall. 79, is here affirmed and cited with approval.

But the law of laches is again distinctly recognized and explained by this Court:

"Courts of Equity frequently treat the lapse of time, even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim."

Golden vs. Kimmell, 99 U. S. 202.

Still again the law of laches is explained, by this Court, in Sullivan vs. Portland St. R. R. Co., 94 U. S. 811, where it said:

"Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the Statute is required; *in some cases a shorter time is sufficient;* and sometimes the rule is applied where there is no statutable bar. It is competent for the Court to apply *the inherent principles of its own system of jurisprudence*, and to decide accordingly."

"A Court of Equity is never active in giving relief against conscience or public convenience."

See also the cases cited in this opinion in 94 U. S. 811.

But there is no rule as to the exact time for any class of cases. Each case is to be examined in the light of surrounding circumstances. If the property in question has been passing through various hands, improved by the purchasers, greatly enhanced in value and in a growing neighborhood, the Court would undoubtedly hesitate to annul conveyances, destroy sales and unsettle titles upon much shorter time than if the property had remained in the same condition as when the sale complained of took place.

The allegation that Vina Bryan did never consent to any of the sales and proceedings, or that she always did affirm that they were unwarranted or void, is not sufficient (if the bill was taken as confessed) to relieve the plaintiff from the effect of the great delay in the commencement of these proceedings. Laches are not avoided by any mental, unmanifested objection. Acts are required in the assertion of rights. But she acquiesced in all the sales with full knowledge, and ought not now to be permitted to set up a mental disapproval without any outward manifestation of it.

We maintain that the decree of the Supreme Court of the Territory of Arizona in this case should be affirmed.

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